SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 371

CROWN COAT FRONT CO., INC., PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., OCTOBER 21, 1966

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION No. 63 Civ. 2281

CROWN COAT FRONT CO., INC., Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant.

COMPLAINT—Filed July 31, 1963

1. Jurisdiction lies under 28 U.S.C. ¶ 1346 (a) (2).

2. Plaintiff, a New York corporation, has its principal office at 105 E. 16th Street, New York, N. Y.

3. Plaintiff and defendant entered into written contract DA36-030-QM-7796 (hereafter "QM-7796"), dated May 14, 1956, for 89,786 canteen covers, 29,927 to be delivered by August 11, 1956, 29,927 by September 11, 1956, and 29,932 by October 11, 1956.

4. Such 89,786 canteen covers were made by plaintiff, in part, from mildew resistant dark gray wool felt purchased by plaintiff from Western Felt Works (hereafter "Western"), after such felt had been tested and approved for use by defendant and such 89,786 canteen covers were delivered by plaintiff to defendant in various quantities in the period running from October 15, 1956 to December 14, 1956.

[fol. 2] 5. During such contract performance, defendant tested samples of plaintiff's felt from eight numbered lots of felt purchased by plaintiff for use on contract QM-7796 from Western and made by Western from wool fiber dyed dark gray, all of which felt upon test by defendant passed the contract specification test for mildew resistance.

6. Defendant rejected felt samples from lots numbered 2, 4, 7, and 8 for not containing contract quantities of

mildew inhibitor dichlorodiphenyl methane as reported by defendant from results of Colorimetric tests performed by defendant, which test was not provided by contract QM-7796.

7. Defendant rejected felt samples from lots numbered 4 and 5 for not containing contract quantities of mildew inhibitor salicylanilide as reported by defendant from results of Ferric chloride tests performed by defendant, which test was not provided by contract QM-7796.

8. The presence of dyestuffs in the felt samples tested by defendant interfered with and made inaccurate the aforesaid Colorimetric and Ferric chloride tests.

9. It was not until March 20, 1959, that defendant informed plaintiff that it had performed such Colorimetric and Ferric chloride tests, and plaintiff had no knowledge thereof until then.

10. Defendant's performance of such Colorimetric and Ferric chloride tests was a change in contract specifications.

11. After aforesaid rejections, defendant, as a condition [fol. 3] to its authorizing plaintiff's use of such felt on contract QM-7796, required plaintiff to consent to contract price reductions and to enter into agreements therefor. Such agreements were entered into by reason of mutual mistake of fact and by reason of defendant's not informing plaintiff of the nature of the tests performed by it and not informing plaintiff of its regulations for accepting deviations, such agreements are not binding but are void.

12. Plaintiff's contract performance was delayed 79 days and plaintiff's commencement of deliveries was delayed until October 15, 1956, and completion of deliveries was delayed until December 14, 1956, by defendant's rejection of plaintiff's felt samples and defendant's requirements of contract price reductions before authorizing use of such felt.

13. The felt samples rejected by defendant as aforesaid conformed to defendant's requirements for serviceability, standardization, maintainability, safety features, and appearance, and there was no loss to the Government.

14. Defendant's contracting officer acknowledged that he knew there were no savings to plaintiff by reason of such alleged mildew inhibitor content, and there were no such savings.

15. Contract QM-7796 contained an article entitled "Changes" which provided for upward price adjustment by reason of changes in specifications, and for settlement of disputes according to the article entitled "Disputes" which [fol. 4] provided for findings of fact and decision by the contracting officer with appeal to the Secretary of the Army whose decision on factual disputes was made final and conclusive upon plaintiff and defendant.

16. Plaintiff duly requested a contract price adjustment to compensate plaintiff for its increased costs of performance of contract QM-7796 caused by aforesaid delays and from the contracting officer's findings of fact and decision denying price adjustment, plaintiff duly appealed to the Secretary of the Army and on February 28, 1963, the Armed Services Board of Contract Appeals (hereafter "Board") rendered its decision, finding that plaintiff was not entitled to any price adjustment and denying plaintiff's appeal.

17. Said Board's decision is not entitled to finality under 68 Stat. 81, 41 U.S.C. ¶¶ 321-322 for the reasons that it was capricious, arbitrary and not supported by substantial evidence, and concerned questions of law, in that said Board disregarded sworn testimony of defendant's contracting officer that he never informed plaintiff that such felt conformed to defendant's requirements for serviceability, standardization, maintainability, safety features and appearances, and that he knew plaintiff had not realized any savings by reason of the mildew inhibitor content of such

felt, and defendant no loss; that he had never informed plaintiff during performance of contract QM-7796 that defendant had performed aforesaid Colorimetric and Ferric chloride tests; said Board disregarded the sworn [fol. 5] testimony of defendant's laboratory witness that the Colorimetric test was not final; said Board disregarded Government specifications providing that such Colorimetric test was not final and could not be used as a basis for rejection; said Board accepted in evidence and relied for its decision upon a technical bulletin not supported by probative evidence; said Board found that the Court of Claims in Crown Coat Front Co., Inc. v. United States, 292 F.2d 290, considered the issue of the finality of the Colorimetric test in its findings and decision, when such findings and decision do not refer to such issue; said Board found that the Government was acting in accordance with the contract when it rejected felt offered by plaintiff when the Government's such action was contrary to the contract; said Board found that defendant's contracting officer's actions were not arbitrary and that he obeyed the spirit and intent of defendant's regulations, when his actions were arbitrary and he disobeyed the spirit and intent of such regulations; for the further reason that by reason of the Board's lack of subpoena power, plaintiff was unable to produce any testimony from Western before said Board.

18. Plaintiff is entitled to an equitable adjustment of the contract price.

Wherefore plaintiff demands judgment against defendant for the sum of Nine thousand Five hundred dollars [fol. 6] or such amount not exceeding Ten thousand dollars as the Court may deem just and equitable.

Jasper I. Manning, Attorney for Plaintiff, 261 Broadway, New York 7, N. Y.

Of Counsel: Edwin J. McDermott, 1901 Three Penn Center Plaza, Philadelphia 2, Pennsylvania.

[fol. 7]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ANSWER

Defendant, United States of America, by its attorney Robert M. Morgenthau, United States Attorney for the Southern District of New York, answering the complaint of plaintiff herein:

1. Denies each and every allegation contained in paragraphs numbered "1", "4", "6", "7", "10", "11", "13", "17" and "18" of the complaint.

2. Denies knowledge or information sufficient to form a belief as to the truth or falsity of each and every allegation contained in paragraphs numbered "2", "5", "8", "9", "12" and "14".

As and for a First Separate Defense to the Alleged Claim for Relief, Defendant Alleges:

3. That the decision of the Armed Services Board of Contract Appeals in *Appeal of Crown Coat Front Co., Inc.*, ASBCA No. 8090 (February 28, 1963), holding that plaintiff [fol. 8] is not entitled to an increase in price under Contract #DA 36-030-QM-7796, is entitled to finality under the provisions of the Wunderlich Act, 68 Stat. 81, 41 U.S.C. §§321-322, said decision not being capricious or arbitrary and being supported by substantial evidence.

4. That the review of the District Court herein is confined by law to the administrative record of the Armed Services Board of Contract Appeals.

As and for a Second Separate, Complete and Affirmative Defense to the Claim for Relief, Defendant Alleges:

5. That the action herein is barred by reason of a judgment having been entered in favor of defendant by the United States Court of Claims (*Crown Coat Front Co.* v. *United States*, 292 F. 2d 290 (1961)) dismissing the claims of plaintiff; said judgment estops plaintiff from relitigating the issues determined by the Court of Claims therein.

As and for a Third Separate, Complete and Affirmative Defense to the Claim for Relief, Defendant Alleges:

6. That the action herein was commenced on or about the 1st day of August, 1963.

7. That said cause of action did not accrue within six years next preceding the date of the commencement of the action herein.

[fol. 9]

As and for a Fourth Separate, Complete and Affirmative Defense to the Claim for Relief, Defendant Alleges:

8. That the Court lacks jurisdiction over the subject matter of this action by reason of the fact that plaintiff had heretofore duly commenced an action in the United States Court of Claims (*Crown Coat Front Co., Inc.* v. *United States*, Ct. Cl. 395-62) on the same cause of action set forth in the complaint herein seeking judgment in the amount of $25,000, and said action was pending between the parties at the time the action herein was commenced.

Wherefore, defendant prays for judgment against plaintiff dismissing the complaint with costs and disbursements, and for judgment affirming the decision of the Armed Services Board of Contract Appeals.

Dated: New York, N.Y., November 29, 1963.

Robert M. Morgenthau, United States Attorney for the Southern District of New York, Attorney for Defendant, By: Arthur M. Handler, Assistant United States Attorney, Office and Post Office Address: United States Court House, Foley Square, New York 7, New York, Tel: CO 7-7100, Ext. 328.

To: Jasper I. Manning, Attorney for Plaintiff, 261 Broadway, New York, New York.

[fol. 10]

IN THE UNITED STATES DISTRICT COURT

CROWN COAT FRONT CO., INC.

v.

UNITED STATES OF AMERICA.

OPINION—January 29, 1965

This suit seeks to recover for an alleged breach of Armed Services Contract, No. QM-7796 of May 14, 1956, for canteen covers. Plaintiff and defendant both move for summary judgment.

Complaint is dismissed because suit is barred by the Statute of Limitations.

The canteen covers contracted for were to be lined with mildew resistant felt of certain specifications. The contract also provided that the Government could inspect and test "raw materials . . . and end products" (General Provisions, page 1) prior to final acceptance, and when found to be defective in "Material or workmanship or otherwise not in conformity with the requirements of this contract", the "Government shall have the right either to reject them

or to require their correction." (General Provisions, page 1). Some samples of felt, purchased by plaintiff for use on the contract from Western Felt Works, were rejected after test by defendant for not containing contract quantities of various mildew inhibitors. Before defendant would allow plaintiff to use the rejected felt on the contract, defendant required plaintiff to consent to contract price reductions of $270.01. Final delivery of the canteens was made by plaintiff on December 14, 1956. (The contract stated that final delivery was to be made by October 12, 1956).

Plaintiff alleges that it was not until March 20, 1959, that "defendant informed plaintiff" that it had performed Colorimetric and Ferric Chloride tests in determining the percentage of mildew inhibitor but had not performed a Parr Chloride test. Plaintiff contends that the above two tests were not provided for by contract QM-7796, and, therefore, there was a change in contract specifications and a breach of contract. After being told which tests were performed on the samples, plaintiff exercised its rights under the "Changes" Clause of contract QM-7796 and demanded that the Contracting Officer grant a refund of the price reductions and compensation for increased costs occasioned by the delay resulting from defendant's rejection of the samples.

Paragraph two of contract QM-7796 provides:

> "*Changes.* The Contracting Officer may at any time . . . make changes within the general scope of this [fol. 11] contract, in any one or more of the following: (i) . . . specifications, where the supplies to be furnished are to be specially manufactured for the Government in accordance therewith; . . . If any such change causes an increase or decrease in the cost of . . . performance of the contract, an equitable adjustment shall be made in the contract price . . . *provided, however,* That the Contracting Officer, if he decides that the facts justify such action, may re-

> ceive and act upon any such claim asserted at any time prior to final payment under this contract. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled 'Disputes'. . . ."

On February 21, 1962, the Contracting Officer rendered findings in which he stated that the Government had employed "an established commercial method" in testing for the mildew inhibitor content of the felt and held that plaintiff was not entitled to an increase in price under the contract. Pursuant to the "Disputes" Clause, paragraph 12 of contract QM-7796, plaintiff filed an appeal to the Armed Services Board of Contract Appeals (ASBCA), which held a full hearing and on February 28, 1963 rendered a decision holding that plaintiff was not entitled to increased compensation. . .

> "12. *Disputes.* Except as otherwise provided in this contract, any dispute concerning a *question of fact* arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing etc. . . . Within 30 days from the date of receipt of such copy, the contractor may appeal . . . to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall be final and conclusive. . . ."

Plaintiff now claims that it is entitled to an equitable adjustment of the contract price and demands judgment against defendant for $9500 or such amount not exceeding $10,000 as this Court may deem just and equitable. Plaintiff contends that the decision of the ASBCA is not entitled to finality because the question before the Court is not properly within the "Disputes" Clause, and because the ASBCA's action was "capricious, arbitrary, and not supported by substantial evidence, and concerned questions of law."

We do not deem it necessary to determine if the question before us is properly within the "Disputes" Clause or to examine the record of the proceedings before the ASBCA, because the action is barred by the Statute of Limitations.

[fol. 12] 28 U.S.C. §2401(a) provides:

> "§2401. *Time for commencing action against the United States.*
>
> (a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. * * *"

The essence of plaintiff's complaint is based on the alleged use by the Government of unwarranted tests and the consequent rejection of felt. This inspection and rejection occurred prior to October 1956; however, neither party contends that this is the date when the claim should be deemed to accrue.

Defendant urges that the claim sued on legally accrued at the latest on December 14, 1956, when plaintiff completed all deliveries of canteen covers under the contract, and that, therefore, this action, filed on July 31, 1963, is barred by the six-year Statute of Limitations.

Plaintiff contends, however, that if this suit be predicated on a question of law the claim did not accrue until November 14, 1962, when defendant made the last payment under the contract, and if the action is based on a question of fact and is within the "Disputes" Clause, plaintiff had no enforceable claim until February 28, 1963 when the ASBCA rendered its decision. Neither of plaintiff's contentions has merit.

The first contention is based on the fact that defendant transmitted to plaintiff certain "prompt payment discounts", which the ASBCA (in a different hearing than that discussed above) held that defendant should not have withheld from plaintiff. Plaintiff cites *B-W Construction*

Company v. *United States*, 100 Ct. Cl. 227 (1943) to support his contention that the statute of Limitations did not begin to run until the Government paid the above "prompt payment discounts". The Court in *B-W Construction Company* stated that:

> "The defendant says that the statute began to run on the date the defendant occupied the building, but it is clear under our decisions that it did not begin to run until the work was finally completed and final voucher was presented. *Pink* v. *United States*, 85 Ct. Cl. 121; *Austin Engineering Co.* v. *United States*, 88 Ct. Cl. 559."

A "final voucher was presented" when plaintiff completed work and deliveries on December 14, 1956. The dispute over manner of payments cannot be considered as affecting the time when a "final voucher was presented." [fol. 13] Another case cited by plaintiff bears out the above observation. In *Acorn Decorating Corporation* v. *United States*, 146 Ct. Cl. 394, 174 F. Supp. 949 (1959), the Court stated (at 951, 398):

> "It should also be noted that final payment was made to plaintiff more than six years from the date of the suit with the exception of $100. Plaintiff contends that since the $100 was finally paid within the 6 year period its claim accrued as of that time, citing *B-W Construction Co.* v. *United States*, 100 C. Cls. 227 and *Austin Engineering Co.* v. *United States*, 88 C. Cls. 559. There is no merit in this contention. The gravamen of these cases is that a cause of action accrues upon a contract when the work is completed and a final voucher presented. See also *Pink* v. *United States*, 85 C. Cls. 121, cert. denied 303 U.S. 642, wherein it was said:
>
> '* * * It has been repeatedly held by this court that under a contract to perform work, the completion

and acceptance date starts the statute to run. It is the completion of the service called for under the contract, and not the date of any payment subsequently made.'"

We conclude that if this claim sued upon is based on a question of law, it is barred by the Statute of Limitations, because plaintiff completed the work, presented its final voucher, and the work was accepted by the Government more than six years prior to filing suit.

Likewise, if the suit is based on a question of fact and is within the "Disputes" Clause, we find that the Statute of Limitations was not tolled during the period of administrative procedures. Plaintiff cites *Acorn Decorating Corporation* v. *United States, supra,* to support his contention. In the case cited, however, the plaintiff had not exhausted his administrative remedies because he failed to appeal an adverse decision to the Secretary of the Army. Therefore, the Court stated that even if plaintiff's contention that the claim did not accrue until the "adverse decision was rendered" by an administrative body were true, plaintiff was still barred for not exhausting his administrative remedies. Contrary to plaintiff's contention, the law is that the pursuit of an administrative remedy does not toll the Statute of Limitations. See *States Marine Corp. of Delaware* v. *United States,* 283 F. 2d 776, 779 (2nd Cir. 1960); *Cisatlantic Corp.* v. *Broubnell,* 131 F. Supp. 406 (S.D.N.Y. 1953), aff'd per curiam, 222 F.2d 957 (2d Cir. 1955); *Leonick* v. *Jones & Laughlin Steel Corp.,* 151 F. Supp. 795 (E.D.N.Y. 1957), aff'd 258 F.2d 48 (2d Cir. 1958); *Fattore* v. *United States,* 312 F.2d 797 (Ct. Cl. 1963). In the *States Marine Corp.* case, the Court held [fol. 14] that plaintiff's claim was barred by the two-year time-bar of the Suits in Admiralty Act even though the delay in bringing the action resulted from the pursuit of administrative adjudication, which was required by plaintiff's contract with the Government. Included in the contract was almost the identical "Disputes" Clause involved

in the contract herein. *States Marine Corp.* submitted its claim to the Contracting Officer and then appealed to the ASBCA just as has been done here.

We find that this suit is barred by the Statute of Limitations and is dismissed. The Clerk is directed to forthwith enter judgment of dismissal on the merits with costs; and it is so ordered.

Dated: January 29, 1965

Sylvester J. Ryan, U.S.D.J.

[fol. 15]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CROWN COAT FRONT CO., INC., Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

JUDGMENT—February 2, 1965

Both plaintiff and defendant having moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure before the Honorable Sylvester J. Ryan, Chief Judge of the United States District Court for the Southern District of New York, and the Court having rendered its memorandum decision on dated January 29, 1965 and filed February 1, 1965, denying plaintiff's motion and granting defendant's motion for summary judgment on the ground that the suit is barred by the Statute of Limitations, it is

Ordered Adjudged and Decreed that the defendant have judgment against the plaintiff, dismissing the action on

the merits on the ground that the suit is barred by the Statute of Limitations.

Dated: New York, N. Y., February 2, 1965.

James E. Valeche, Clerk.

Costs taxed in sum of $20.00 and added as judgment # 2/18/65.

James E. Valeche, Clerk.

[fol. 16]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 34—September Term, 1965

Docket No. 29710

CROWN COAT FRONT CO., INC., Plaintiff-Appellant,

—v.—

UNITED STATES OF AMERICA, Defendant-Appellee.

OPINION—June 22, 1966

Argued October 5, 1965. Submitted to the *in banc* court December 9, 1965.

Before: Lumbard, Chief Judge, and Waterman, Moore, Friendly, Smith, Kaufman, Hays, Anderson and Feinberg, Circuit Judges.

Appeal from summary judgment, entered on Government's cross-motion, by the United States District Court for the Southern District of New York, Ryan, Chief Judge.

Affirmed.

Edwin J. McDermott, Philadelphia, Pa. (Jasper I. Manning, New York City, on the brief), for Plaintiff-Appellant.

[fol. 17] Arthur M. Handler, Asst. U. S. Atty., Southern District of New York (Robert M. Morgenthau, U. S. Atty., and Alan G. Blumberg, Asst. U. S. Atty., Southern District of New York, on the brief), for Defendant-Appellee.

Waterman, Circuit Judge (with whom Judges Lumbard, Moore and Smith concur; Judge Friendly concurs in a separate opinion; Judge Anderson dissents in a separate opinion with whom Judges Kaufman, Hays and Feinberg concur):

Plaintiff-appellant, on July 31, 1963, commenced its action against the United States in the United States District Court for the Southern District of New York. After the Government answered, pleading among other things that the action was time-barred, both parties moved for summary judgment. The court below granted the Government's motion and dismissed the complaint on the ground that the complaint had not been filed within six years after plaintiff's cause of action had accrued. 28 U. S. C. §2401(a). Plaintiff's appeal from the dismissal was heard by a panel of this court composed of Judges Waterman, Hays and Anderson, and while the case was *sub judice* before the panel the active circuit judges, on December 9, 1965, voted to consider the case *in banc* without further briefs or oral argument. The thrust of appellant's claim on appeal is that it was required fully to exhaust the administrative remedies it had agreed to pursue under the "disputes clause" of its contract before it could institute a suit against the United States, and that, having filed its suit within six years after the final decision in the matter by the Armed Services Board of Contract Appeals, it had therefore filed [fol. 18] within six years from the date that its right of action accrued.[1]

[1] Appellant's brief sets forth the questions involved as follows:

"1. Where the 'Changes' clause of the contract provides that any failure to agree to a contract price adjustment is a dispute

The Government, meeting this thrust, briefed its case on the sole issue whether, "pursuant to 28 U. S. C. §2401(a), a contractor's 'right of action' against the Government 'first accrues' (i) on the date of the alleged breach of contract by the Government, or (ii) on the date of a decision of the ASBCA denying the contractor's claim."

On May 14, 1956 the appellant entered into a contract with the Government to manufacture and deliver 89,786 felt canteen covers for a total agreed price of $60,691.76. The contract called for the use of mildew-resistant felt, made in accordance with certain established specifications, and provided for the submission of samples to the Government for testing and inspection, prior to manufacture. It also stipulated that if these samples did not meet specifications, the Government had "the right either to reject them or to require their correction." In addition, the agreement included the standard "disputes" clause which required [fol. 19] that, in the first instance, "any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided" by the Contract-

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concerning a question of fact within the meaning of the 'Disputes' clause, and the 'Disputes' clause provides a procedure for the settlement of disputes arising under the contract, must not the contractor pursue such administrative remedy and secure a final decision thereof before he may institute suit? Negatived by the Court below.

"2. Where the plaintiff-appellant brings suit within the statutory period of six years after the final decision of the Armed Services Board of Contract Appeals under the 'Disputes' article of the contract, is plaintiff-appellant barred by the statute of limitations? Affirmed by the Court below."

In its reply brief, filed August 27, 1965, appellant reiterated the position that "Since plaintiff-appellant's suit was filed within six years from the date that its right of action accrued, it was timely," and that it "could not have sued until the decision of the Armed Services Board of Contract Appeals was rendered on February 28, 1963."

ing Officer, from whose decision an appeal could be taken to the Armed Services Board of Contract Appeals (ASBCA).[2]

In accordance with the contract, appellant submitted four lots of felt samples for testing and inspection. After making laboratory tests in October and November 1956, the Government rejected the samples. Thereupon the appellant requested, and the Government agreed to accept, the delivery of the canteen covers made from the non-conforming felt. A contract modification of $.005 less per unit —a total of $270.01—was agreed upon. Final delivery was made on December 14, 1956, and in all other respects the modified contract was fully performed.

[fol. 20] The appellant claims that it was not until nearly five years later that it first learned the Government had improperly tested the samples by submitting them to a different test than contemplated by the contract. On October 4, 1961, appellant's counsel wrote the Contracting Officer and demanded (1) a refund of the $270.01 price ad-

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[2] Such a clause is required for most government contracts. See 32 C. F. R. §7.103-12 and 32 C. F. R. §596.103-12. The clause in question in this case reads as follows:

> "Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement, shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith, be final and conclusive; provided that, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision."

justment, and (2) an equitable adjustment for alleged increased extra production costs resulting from the initial rejection of the samples. On February 21, 1962, the Contracting Officer filed a decision in which he found that the Government had determined by "an established commercial test method" that the felt samples were nonconforming, and that the price reduction was proper. By opinion dated February 28, 1963, the ASBCA affirmed the Contracting Officer's denial of the claim. On July 31, 1963, five months after the ASBCA decision, but more than six years after the December 14, 1956 final delivery of canteen covers and presentation of the final invoice, appellant brought this suit under the Tucker Act, 28 U. S. C. §1346(a)(2), demanding the $270.01 and a sum "not exceeding $10,000 as the court may deem just and equitable" as compensation for the alleged extra production costs. As stated above, on cross-motions for summary judgment the district judge dismissed the complaint, holding that it had been time-barred by the six year limit[3] within which Congress had

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[3] Section 1346(a)(2) of Title 28 U. S. Code derives from the so-called Tucker Act, the Act of March 3, 1887, 24 Stat. 505, c. 359, entitled "An act to provide for the bringing of suits against the Government of the United States." It presently reads:

"§1346. United States as defendant.

"(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * * * * *

"(2) Any other civil action or claim aginst the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

The Tucker Act was a comprehensive statute and also included among other provisions a predecessor provision to the present 28 U. S. C. §2401(a), which now reads:

"§2401. Time for commencing action against United States.

"(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person

[fol. 21] authorized suspension of the Government's sovereign immunity from suit.[4] This appeal followed. We affirm the district court.

At the outset we agree with the finding of the court below that the alleged breach of the contract occurred at the very latest on December 14, 1956. That was the date of the final delivery of the canteen covers found to be nonconforming by the use of a test not contracted for. The right of action against the Government accrued at the time of the breach of the agreement by the Government and not at some later time. This would appear to be settled by *McMahon* v. *United States*, 342 U. S. 25, 72 Sup. Ct. 17, 96 L. Ed. 26 (1951) where the Supreme Court held in a much more appealing case that a seaman's claim for injuries arose when he was injured, and not when his claim had been finally administratively disallowed. The Court specifically rejected [fol. 22] both the contention that the seaman could not sue until disallowance and that he had no cause of action until then. As the Court pointed out, even where statutes are to be construed liberally for the benefit of seamen, "it is equally true that statutes which waive immunity of the United States from suit are to be construed strictly in favor of the sovereign," *supra* at 27. Hence there the two-year

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under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases."

[4] We should make mention that the appellant, as a third string to its bow, attempted unsuccessfully to convince the district court that if, despite appellant's arguments otherwise, the six-year period began to run prior to the final administrative order, it began to run at a date later than December 14, 1956, on November 14, 1962. On this date the appellant received a refund from the Government of $646.06 which the ASBCA had determined in a different proceeding had been erroneously deducted as prompt payment discounts the Government should not have withheld. As will appear from our later discussion herein we agree with the district court that there is no merit to this contention.

period of limitation built into the Suits in Admiralty Act[5] was held to begin to run as of the date of the injury.

Following *McMahon*, and after the passage of the Wunderlich Act, May 11, 1954, c. 199, 68 Stat. 81, 41 U. S. C. §§321-322, we, in *States Marine Corp.* v. *United States*, 283 F. 2d 776 (2 Cir. 1960) ruled against a libelant who claimed that the Government in December 1954 had breached a contract with it. We so ruled because the plaintiff's libel had not been filed until September 1957, even though during 15 months of the elapsed 33 months the contractor's claim had been under consideration, first by the Contracting Officer and then by the ASBCA, pursuant to a "Disputes" clause in the contract like the "Disputes" clause in appellant's contract.[6]

In fact, in *States Marine* we disposed of every claim appellant makes here. We held that the contractor should not await final decision of the ASBCA, in accord with his agreement to submit disputes to the agency officers, before commencing a protective suit, and that the time-bar period did not begin to run from the time of the final decision of the ASBCA, but, as the right of action accrued at the time of the breach, the time-bar began to run then. Moreover, we held, *supra* at 779, that the running of the time-bar was not [fol. 23] tolled during the period when the claim was under administrative consideration.

Unless a reason exists for differently treating a suit brought pursuant to the permission granted by the Tucker Act from a suit brought pursuant to the permission granted by the Suits in Admiralty Act, we would be required to overrule the law of this circuit laid down in *States Marine* and reaffirmed in *Isthmian S.S. Co.* v. *U. S.*, 302 F. 2d 69 (2 Cir. 1962) if we were to grant relief to the appellant here.

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[5] Section 5 of the Suits in Admiralty Act, March 9, 1920, c. 95, 41 Stat. 525; 46 U. S. C. §745.

[6] See footnote 2, *supra*, and footnote 1 in *States Marine Corp.* v. *United States*, *supra*, at 777.

After final briefs had been filed by the parties the Third Circuit handed down its opinion in *Northern Metal Co.* v. *United States*, 350 F. 2d 833 (3 Cir. 1965). In that case *McMahon* was followed as to the fixing of the time when the two-year time-bar began to run, but, in direct conflict with the opinion of our court in *States Marine Corp.* v. *United States, supra,* and the decisions following it (including the district court opinion appealed from in *Northern Metal*, 230 F. Supp. 38 (E. D. Pa. 1964)) the Third Circuit held that the running of this time-bar was tolled during the pendency of the administrative proceedings. The issue of such a possible tolling of the Tucker Act's six-year time-bar had not been comprehended within the thrust of appellant's contentions, see footnote 1; and that fact, together with the square conflict of the two circuits relative to the tolling of the Suits in Admiralty Act's two-year time-bar, caused the panel *sua sponte* to refer adjudication of the case to all the active judges.[7]

Though the more recent Suits in Admiralty Act appears in the U. S. Code, section for section, much as it was when adopted in 1920, and the various provisions, section for [fol. 24] section, of the eighty-year old Tucker Act are split up, here and there, in Title 28 of the Code, both Acts of Congress are grants of rights to sue the Government, which, being the sovereign, has full immunity from standing any suit at all. As such, both Acts set forth the kinds of claims that may be brought, the courts within which these specified claims are to be litigated, and the length of time within which these specified claims may be presented after the cause of action arose, or accrued. These built-in limitations upon a more complete waiver of sovereign immunity spell out the ambit within which a would-be litigant seeking recovery from the sovereign must operate; in short, unless the would-be litigant operates within the area of the statu-

[7] Appellant's action was commenced seven and one-half months after the six year jurisdictional limitation began to run, but if the time when administrative proceedings were pending is to be excluded from computation, the action was not time-barred.

tory grant, he is outside the jurisdiction the sovereign granted him, whether his cause of action is an impermissible one, he is in the wrong forum, or his time in which to act has expired.

Of the time-bar condition, we said in *States Marine*:

> "The two year time-bar of the Suits in Admiralty Act is unlike a time-bar period prescribed under an ordinary Statute of Limitations. Under an ordinary time-bar statute a claim is not extinguished after the statutory period has elapsed. It is only unenforceable. The time-bar of the Suits in Admiralty Act renders a claim against the United States not only unenforceable, but extinguishes the claim itself, for when the sovereign, immune from suit, consented to be sued it was made a condition of the right to sue that suits so authorized had to be brought within the time-bar period. *McMahon* v. *United States*, 342 U. S. 25, 72 S. Ct. 17, 96 L. Ed. 26 (1951); *Sgambati* v. *United States*, 172 F. 2d 297, 298, *cert. denied*, 337 U. S. 938, 69 S. Ct. 1514, 93 L. Ed. 1743 (1949).
>
> [fol. 25] "It therefore follows that despite any maritime contractual agreements that parties may enter into with the United States such contractual agreements may not extend the time-bar period of two years prescribed by Section 5 of the Suits in Admiralty Act within which suit against the United States may be commenced. *United States* v. *Wessel, Duval & Co.*, 115 F. Supp. 678 (S. D. N. Y. 1953). Accord, *Atlantic Carriers, Inc.* v. *United States*, 131 F. Supp. 1 (S. D. N. Y. 1955). Jurisdiction to hear a case brought at a later date than two years after the cause of action arose cannot be awarded to the court by agreement." 283 F. 2d 776, 778.

What we said in *States Marine* about the time-bar of the Suits in Admiralty Act applies to the time-bar of the Tucker Act. A Tucker Act claim is extinguished when the limiting

time expires. The claim being extinguished, the court's jurisdiction is gone, and jurisdiction to adjudicate the claim cannot be conferred upon the court by any agreement.

Prior to the passage of the Tucker Act in 1887, a suit could be brought against the United States in the Court of Claims provided it was brought within six years after the right to suit had accrued. The Tucker Act, adopted March 3, 1887, awarded a claimant whose claim against the Government was for a sum under $10,000 the right to present his claim to a specified United States District Court or Circuit Court *"Provided,* That no suit against the Government of the United States shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made." The provision of the Tucker Act granting grace to suitors to sue in a district court is now found in 28 U. S. C. §1346 (a)(2); the time-bar limitation is now found, since the 1948 edition of the Judicial Code, in 28 U. S. C. §2401(a). These [fol. 26] two subsections, each derived from the Tucker Act, should be read in connection with each other, Section 2401 (a) jurisdictionally limiting the exercise of the right to sue which the sovereign granted under 28 U. S. C. §1346(a).

In October 1887, the same year that the Tucker Act was adopted, in deciding an appeal to the U. S. Supreme Court from a decision of the Court of Claims, Justice Harlan stated in *Finn* v. *United States,* 123 U. S. 227, 232-233, with reference to the permissive six-year period then, and now, applicable to that Court, the following:

> The general rule that limitation does not operate by its own force as a bar, but is a defence, and that the party making such a defence must plead the statute if he wishes the benefit of its provisions, has no application to suits in the Court of Claims against the United States. An individual may waive such a defence, either expressly or by failing to plead the statute; but the Government has not expressly or by implication conferred authority upon any of its officers

> to waive the limitation imposed by statute upon suits against the United States in the Court of Claims. Since the Government is not liable to be sued, as of right, by any claimant, and since it has assented to a judgment being rendered against it only in certain classes of cases, brought within a prescribed period after the cause of action accrued, a judgment in the Court of Claims for the amount of a claim which the record or evidence shows to be barred by the statute, would be erroneous.

In *United States* v. *Greathouse*, 166 U. S. 601 (1897) the Tucker Act was construed, again by Mr. Justice Harlan. *Finn* v. *United States* was cited and followed. The Court held:

> [fol. 27] We may add that it was not contemplated that the *limitation* upon suits against the Government in the District and Circuit Courts of the United States should be different from that applicable to like suits in the Court of Claims. 166 U. S. at 606. (Emphasis supplied.)

Shortly thereafter, in *United States* v. *Wardwell*, 172 U. S. 48 (1898) the matter has been laid to rest in the Supreme Court for seventy years. Mr. Justice Brewer, beginning the opinion for the unanimous Court in that case stated, p. 52:

> Section 1069, Revised Statutes, is not merely a statute of limitations but also jurisdictional in its nature, and limiting the cases of which the Court of Claims can take cognizance. *Finn* v. *United States*, 123 U. S. 227.

This "jurisdictional" interpretation of the six-year time-bar has never been overruled by the United States Supreme Court. And the Court, consistent with this interpretation, has rejected the contention that the jurisdictional time-bar should not begin to run until after an administra-

tive denial of a claimant's claim when that contention has been advanced on the theory that there is no ground for a suit in court until all administrative remedies have been exhausted. *Soriano* v. *United States*, 352 U. S. 270, 77 Sup. Ct. 269, 1 L. Ed. 2d 306 (1957).

Appellant states in his complaint that the decision of the Armed Services Board of Contract Appeals "is not entitled to finality under 68 Stat. 81, 41 U. S. C. §§321-322 for the reasons that it was capricious, arbitrary and not supported by substantial evidence . . . " Apparently this reference to the so-called "Wunderlich" Act of 1954 was [fol. 28] intended to nip in the bud any government defense that this ASBCA decision was a final disposition of plaintiff's claims. Of course this reference in its complaint brought pursuant to 28 U. S. C. §1346(a)(2) is not construable as pleading a separate right to review that administrative result, and, too, as we have above stated, the fact of this decision has no bearing upon the accrual of plaintiff's right to sue. *Soriano* v. *United States, supra; McMahon* v. *United States, supra; States Marine Corp.* v. *United States, supra; Northern Metal Co.* v. *United States, supra* at 836.

Even as we cannot accept February 28, 1963 as the date when appellant's claim accrued we also cannot accept November 14, 1962 as the date of accrual, the date the Government refunded the erroneously withheld prompt payment discounts. A refunding adjustment made years after the final delivery of goods and the submission of a voucher for payment of those goods is not a "final voucher" submitted by the contractor, and, as pointed out by the court below, appellant's right to sue accrued when its work was completed and its final voucher was submitted. See *B-W Construction Company* v. *United States*, 100 Ct. Cl. 227 (1943); *Austin Engineering Co.* v. *United States*, 88 Ct. Cl. 559; *Acorn Decorating Corporation* v. *United States*, 146 Ct. Cl. 394, 174 F. Supp. 949 (1959). As was said by the Court of Claims in *Pink* v. *United States*, 85 Ct. Cl. 121, *cert. denied*, 303 U. S. 642, 58 Sup. Ct. 641, 82 L. Ed. 1102 (1938):

> . . . It has been repeatedly held by this court that under a contract to perform work, the completion and acceptance date starts the statute to run. It is the completion of the service called for under the contract, and not the date of any payment subsequently made.

[fol. 29] Finally, it is clear that when Congress passed the Wunderlich Act that body did not intend to grant any new period of permissive delay within which the built-in six-year time-bar of the Tucker Act might be tolled. The House Committee Report is explicit on the point and demonstrates that Congress was fully aware of the established law and did not intend to affect it. H. R. Rep. No. 1380, 83d Cong., 2d Sess. (1954), 2 U. S. Code & Ad. News, 2191, 2196 (1954), see *Cosmopolitan Mfg. Co.* v. *United States,* 297 F. 2d 546, 549 (Ct. Cl.), *cert. denied,* sub nom. *Arlene Coats* v. *United States,* 371 U. S. 818 (1962).

In view of the foregoing, we reiterate what we said in *States Marine Corp.* v. *United States, supra,* at 779, and hold here that inasmuch as the six-year limitation is a restriction upon the jurisdiction of the district court, the running of the six-year time-bar could not be extended by the Disputes Clause agreement of the parties, or tolled during the period that appellant's claim was being administratively considered.

In general, see *United States* v. *Utah Construction and Mining Co.,* —— U. S. —— (June 6, 1966) and *United States* v. *Carlo Bianchi & Co.,* 373 U. S. 709 (1963), if a claimant is uncertain whether he should proceed at once with a Tucker Act suit or first submit a dispute, pursuant to his agreement, to the ASBCA, he may always protect himself by instituting a "protective suit" within the six-year period permitted by the Tucker Act, staying its progress until after a final administrative decision, and then bringing it forward if the administrative decision is adverse to him.

The judgment below is affirmed.

[fol. 30] FRIENDLY, Circuit Judge (concurring):

If the issue here were now arising in this court for the first time, I might well be persuaded to the position taken by Judge Freedman in *Northern Metal Co.* v. *United States*, 350 F. 2d 833 (3 Cir. 1965) and by my brother Anderson in dissent, rather than to that which we adopted in *States Marine Corp.* v. *United States*, 283 F. 2d 776 (2 Cir. 1960). But the issue is a close one on any view, there is much to be said for *States Marine*, and it derives considerable support from the language of *Soriano* v. *United States*, 352 U. S. 270, 274-75 (1957). That we are sitting *in banc* does not relieve us of the judicial obligation to pay proper heed to precedent; the question still is "not what we would hold if we now took a fresh look but whether we should take that fresh look," *Mississippi River Fuel Corp.* v. *United States*, 314 F. 2d 953, 958 (Ct. Cl. 1963) (concurring opinion of Davis, J.). Judge Davis' illuminating opinion identifies several factors that may justify this; when none of these exists, "respect for an existing precedent is counselled by all those many facets of stability-plus-economy which are embodied in the principle of *stare decisis*." The only thing in the picture now that was not before the *States Marine* panel six years ago is the Third Circuit's opinion in *Northern Metal;* valuable as that is, it can hardly be rated, to use Judge Davis' phrase, as "an intervening development in the law, or in critical comment, which unlocks new corridors." What it does do is to provide a ready handle for opening the door to correction, if we are wrong, by the only tribunal that can settle the issue once and for all. Supreme Court Rule 19.

[fol. 31] Anderson, Circuit Judge (dissenting):

I dissent. I do, however, agree with the majority that the period of limitations began to run on the date of the alleged breach of the contract. The claim for breach accrued at the latest on December 14, 1956, the date of the final delivery, which was more than six years prior to the commencement of this action. The Supreme Court decided

in *McMahon* v. *United States*, 342 U. S. 25 (1951) that a seaman's claim for injuries accrued at the date of the injury, and not at the date when his claim was rejected by administrative officers.[1] A similar result has been reached in our own circuit in *States Marine Corporation of Delaware* v. *United States*, 283 F. 2d 776, 778 (2d Cir. 1960), and more recently by the Third Circuit in *Northern Metal Co.* v. *United States*, 350 F. 2d 833 (3d Cir. 1965).

I am of the opinion, however, that the decision below should be reversed because the limitations period was tolled during the pendency of the administrative proceedings required by the disputes clause.

As the Supreme Court stated in *Burnett* v. *New York Cent. R. Co.*, 380 U. S. 424, at 426 (1965),

> "The basic question to be answered in determining whether, under a given set of facts, a statute of limitations is to be tolled, is one 'of legislative intent whether the right shall be enforceable . . . after the prescribed time.'"

The Court went on to say at 427,

> "In order to determine congressional intent, we must examine the purposes and policies underlying the limi-[fol. 32] tation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act."

The statutes of limitations are statutes of repose, designed to put an end to litigation.

> "The primary consideration underlying such legislation is undoubtedly one of fairness to the defendant. There comes a time when he ought to be secure in his

[1] In *McMahon* the Supreme Court left open the question of whether the statutory period there in question had been tolled, since a decision on that point would not have affected the result. 342 U. S. at 28.

reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim when 'evidence has been lost, memories have faded, and witnesses have disappeared.'" Note, 63 Harv. L. Rev. 1177, at 1185 (1950).

See *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342, at 348-349 (1944).

"This policy of repose, designed to protect defendants, is frequently outweighed, however, where the interests of justice require vindication of the plaintiff's rights."

Burnett v. *New York Cent. R. Co., supra,* at 428. Thus courts have engrafted numerous exceptions upon statutory periods of limitations. See, e.g., *Urie* v. *Thompson,* 337 U. S. 163 (1949); *Bailey* v. *Glover,* 88 U. S. (21 Wall.) 342 (1874). The otherwise mechanical results, to which the unbated application of the limitations periods would lead, have thus been mitigated by familiar principles such as the one that a period of limitations is tolled until fraud is discovered. *Bailey* v. *Glover, supra.* Similarly it is accepted that,

"Where the plaintiff is prevented from finding timely suit by force of law, it is manifestly unjust to penalize him by barring the suit." 63 Harv. L. Rev. at 1233.

[fol. 33] And in *Urie* v. *Thompson, supra,* the Supreme Court recognized that a claim for an injury caused by a slow and continuing process was not barred if brought within three years of *discovery* of the ailment. Finally, in other instances it is recognized that the principles of estoppel may prevent a defendant from raising the defense of the statute of limitations, "when his representations or conduct have induced the plaintiff to forbear from prosecuting his known cause of action, and the limitations period has expired while the plaintiff continues to forbear." 63 Harv. L. Rev. at 1222. The application of these principles should

not depend upon whether the statute of limitations involved is one which may be characterized as "substantive" or "procedural." Nor does the fact that a newly created right of action sprang from a waiver of sovereign immunity render the statute of limitations impervious to the application of those same mitigating considerations. In every case inquiry should be directed to the basic question of "legislative intent." *Burnett* v. *New York Cent. R. Co., supra.* By making the administrative proceedings a mandatory prerequisite to the seeking of relief in such cases from the courts, Congress did not intend that the statute of limitations would run during the pendency of those administrative hearings and deliberations.

Looking to the scheme of the Tucker Act, 28 U. S. C. §1346(a)(2) (1964 ed.), and the liberal purpose which it evinces to permit suits based upon contract claims to be brought against the Government, it would be anomalous to hold that the Government, through its power to make regulations, could require the inclusion in all of its thousands of procurement contracts of a mandatory provision that claims must first be processed through its administrative channels, and, by proceedings long drawn out, effec- [fol. 34] tively defeat the rights of claimants to present their claims to a court of law. There is, of course, no doubt that the appellant was required first to proceed with, and exhaust, its administrative remedies before it could sue under the Tucker Act. See, e.g., *United States* v. *Joseph A. Holpuch Co.*, 328 U. S. 234 (1946); and *Northern Metal Co.* v. *United States, supra,* at 839, which says,

> "Since the Government through its contracting officer and the Armed Services Board of Contract Appeals not only was aware of the claim but was engaged in deciding its merits, it would be harsh and out of harmony with the purpose and intention of Congress to hold that the statutory time ran during the pendency of the administrative proceedings."

In this kind of case many of the factors which usually provide the basis for the rationale of the limitations periods are absent. By bringing its claim to the contracting officer within six years of its accrual, the appellant effectively gave the Government all the notice to which it was entitled. The administrative proceedings which were held had the effect of recording and preserving all of the relevant evidence. There is, therefore, none of the dangers against which the time bars are designed to protect. The Government is not being called upon to defend a claim after "evidence has been lost, memories have faded, and the witnesses have disappeared." *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc., supra,* at 349. Indeed, prejudice will result only if the suit is not permitted, in the event of which the party to suffer will be the plaintiff. It is my opinion that *States Marine Corporation of Delaware* v. *United States,* 283 F. 2d 776 (2d Cir. [fol. 35] 1960), which in cases of this kind operates harshly and unjustly, should be overruled.

I do not believe that the contractor's ability to bring a protective suit is a satisfactory solution to the problem. Such a procedure would inevitably lead to the defeat of many legitimate claims in the cases of claimants who are unaware of the need for bringing such protective actions. Furthermore, it would have the unfortunate effect of increasing the burden of the district courts by causing still more crowding of already crowded dockets with lawsuits which will languish for years during the pendency of administrative proceedings, and which in all probability will never come up for trial. Therefore, as a matter of sound judicial administration the requirement that a protective suit be commenced within the period of limitations has little to commend it.

The statutory period of limitations (28 U. S. C. §2401(a) (1964 ed.)), which is applicable to the Tucker Act, should be held to be tolled during the pendency of the administra-

tive proceedings required by the "disputes" clause.[2] This does not mean that a contractor may indefinitely put off the time of suit. "On the contrary, the time would run during the contractor's delay in presenting the dispute and [fol. 36] would be tolled only during its pendency before the contracting officer and the Armed Services Board of Contract Appeals, a period which is in the control of the Government's employees and not of the contractor." *Northern Metal Co.* v. *United States, supra,* at 839. Because the appellant commenced its administrative petition within the six year period and because its suit, if allowance be made for a tolling of the statute during the administrative proceedings, was brought within the statutory period, the present action was timely brought. " . . . [P]laintiff has not slept on his rights but, rather, has been prevented from asserting them." *Burnett* v. *New York Cent. R. Co., supra,* at 429.

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[2] Cf. *Carnation Co.* v. *Pacific Westbound Conference,* 383 U. S. 213 (1966), where, in another context, the Supreme Court, in a dictum stating that it was error to dismiss an action which the Court of Appeals had decided should have been presented first to an administrative tribunal, noted that:

> "Such claims are subject to the Statute of Limitations and are likely to be barred by the time that the . . . [administrative agency] acts. Therefore, we believe that the Court of Appeals should have stayed the action instead of dismissing it." 383 U. S. at 223.

While the subject matter in *Carnation* is certainly different from the one which is now before our court, nevertheless the same considerations apply and dictate that the Statute of Limitations should be tolled during the pendency of the administrative proceedings before the ASBCA.

[fol. 37]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of June one thousand nine hundred and sixty-six.

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. Henry J. Friendly, Hon. J. Joseph Smith, Hon. Irving R. Kaufman, Hon. Paul R. Hays, Hon. Robert P. Anderson, Hon. Wilfred Feinberg, Circuit Judges.

CROWN COAT FRONT CO., INC., Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, Defendant-Appellee.

JUDGMENT—June 22, 1966

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk.

[fol. 38] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 39]

SUPREME COURT OF THE UNITED STATES

No. 371—October Term, 1966

CROWN COAT FRONT CO., INC., Petitioner,

v.

UNITED STATES.

ORDER ALLOWING CERTIORARI—October 10, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[redacted]

In the

Supreme Court of the United States

October Term, 1966

CROWN COAT FRONT CO., INC., Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[redacted]

[redacted]
Attorney for Petitioner

[redacted]

INDEX

CITATIONS

Cases:

CITATIONS—*Continued*

IN THE

Supreme Court of the United States

October Term, 1966

No.

CROWN COAT FRONT CO., INC., *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Crown Coat Front Co., Inc., prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit entered in this case on June 22, 1966.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (App., *infra*, p. 27) is not reported. The opinion of the Court of Appeals for the Second Circuit (App., *infra*, p. 8) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered June 22, 1966. The jurisdiction of this Court is invoked pursuant to the provision of 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether the running of the statutory limitation period was tolled during the pendency of the administrative proceeding under the standard Government contract disputes clause.

STATUTORY AND CONTRACT PROVISION INVOLVED

1. The Act of June 25, 1948, 62 Stat. 971, 28 U. S. C. 2401(a) provides:

> "§2401. Time for commencing action against United States.
>
> "(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases."

2. The Disputes Article of the contract here involved provides (App., *infra*, pp. 11, 29):

> "Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall

reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith, be final and conclusive; provided that, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision."

STATEMENT

On May 14, 1956 petitioner entered into a contract with respondent to manufacture and deliver 89,786 felt canteen covers for a total agreed price of $60,691.76. The contract called for the use of mildew resistant felt made in accordance with certain established specifications and provided for the submission of samples to the Government for testing and inspection, prior to manufacture; and stipulated that if these samples did not meet specifications the Government had "the right either to reject them or to require their correction." (App. pp. 10, 27). The contract included a standard "disputes" clause which required that "any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided" by the Contracting Officer, from whose decision an appeal could be taken to the Armed Services Board of Con-

tract Appeals. After making laboratory tests of four lots of samples submitted by petitioner for testing and inspection the Government rejected the samples and upon a price reduction of $.005—a total of $270.01—the canteen covers made from allegedly non-conforming felt were accepted by the Government. Final delivery was made December 14, 1956 (App. pp. 11, 27). Petitioner claims that it was not until nearly five years later that it first learned the Government had improperly tested the samples by submitting them to a different test than contemplated by the contract. Thereupon, on October 4, 1961 petitioner wrote the Contracting Officer and demanded refund of the price adjustment of $270.01 and an equitable adjustment for the increased extra production costs resulting from the initial rejection of the samples. On February 21, 1962 the Contracting Officer issued a decision in which he found that the Government had determined by "an established commercial test method" that the felt samples were nonconforming and that the price reduction was proper. By opinion dated February 28, 1963 the ASBCA affirmed the Contracting Officer's denial of the claim. On July 31, 1963, five months after the ASBCA decision, but more than six years after the December 14, 1956 final delivery of canteen covers and presentation of the final invoice, petitioner brought this action under 28 U. S. C. 1346(a)(2) in the United States District Court for the Southern District of New York to recover compensation for the extra production costs and the $270.01 price reduction. The District Judge dismissed the complaint holding that it was barred by the six-year limitation contained in 28 U. S. C. 2401(a) (App., *infra*, p. 32). Petitioner appealed to the Court of Appeals for the Second Circuit. The appeal was argued October 5, 1965 before a panel composed of Judges Waterman, Hays and Anderson.* While the case was *sub judice* before the panel, the active circuit judges, on December 6, 1965, voted to consider the case *en banc* without

* *Northern Metal Co. v. United States*, 350 F. 2d 833 (3 Cir. Aug. 27, 1965), was then available in slip form and was the subject of oral argument by counsel and comment by the Court.

further briefs or oral argument (App., *infra*, p. 9). On June 22, 1966, by a divided court, the judgment of the District Court was affirmed (App., *infra*, p. 21). The opinion per Waterman, Circuit Judge, with whom Judges Lumbard, Moore and Smith concurred, was for affirmance on the authority of *States Marine Corp. v. United States*, 283 F. 2d 776 (2 Cir. 1960) (App., *infra*, p. 20). Judge Friendly concurred in a separate opinion on the precedent of *States Marine*, with, but for the precedent, an inclination toward Judge Anderson's dissent (App., *infra*, p. 21) and Judge Anderson dissented in a separate opinion with which Judges Kaufman, Hays and Feinberg concurred, on the authority of *Northern Metal Co. v. United States*, 350 F. 2d 833 (3 Cir. 1965) (App., *infra*, p. 26).

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals' decision is in conflict with a decision of another Court of Appeals on the same matter. The decision of the Court below in the instant case and in *States Marine Corp. v. United States*, 283 F. 2d 776 (2 Cir. 1960), upon the authority of which the instant case was decided, are directly in conflict with the decision of the Third Circuit Court of Appeals in *Northern Metal Co. v. United States*, 350 F. 2d 833 (3 Cir. 1965). This conflict was the reason why this case, after having been argued before a panel of three Circuit Judges, was referred for adjudication to the nine active Judges of the Court of Appeals for the Second Circuit (App., *infra*, p. 9). This conflict was conceded by the Court below both in the opinion by Waterman, Circuit Judge (App., *infra*, p. 15), in the concurring opinion by Friendly, Circuit Judge (App., *infra*, p. 21), and in the dissenting opinion by Anderson, Circuit Judge (App., *infra*, p. 21). In his concurring opinion, Judge Friendly said that the issue, on which the conflict existed, could be settled once and for all by this Court (App., *infra*, p. 21). The issue involved is a recurring one suffi-

ciently important to warrant authoritative pronouncement by this Court.

2. The case poses the important question whether the statute of limitations on a suit for equitable adjustment under a Government supply contract is tolled during the pendency of the administrative proceedings required by the standard contract disputes clause. The standard contract disputes clause has frequently received the Court's attention. In *United States v. Carlo Bianchi & Co.*, 373 U. S. 709 (1963), the Court held that, aside from questions of fraud, a reviewing Court is limited to the administrative record made below in determining the finality to be given departmental decisions in findings made by a Board of Contract Appeals pursuant to the standard contract disputes clause. In *United States v. Anthony Grace & Sons, Inc.*, U. S. , June 6, 1966, the Court held that the Board of Contract Appeals acting under a standard contract disputes clause and not the reviewing Court, should make the original recommendation on an issue which the Board did not resolve because it erroneously dismissed the appeal as untimely. In *United States v. Utah Construction and Mining Co.*, U. S. , June 6, 1966, the Court held that the standard disputes clause excluded breach of contract claims from its coverage and that administrative findings in the course of adjudicating claims within the disputes clause were not to be retried in a judicial proceeding but to be reviewed by the Court on the administrative record. In *United States v. Holpuch*, 328 U. S. 234, 239, 243 (1946); *United States v. Blair*, 321 U. S. 730, 734-737 (1944), the Court held that the administrative procedure required by the contract disputes clause must be exhausted before bringing suit for judicial relief.

This case presents the issue whether the administrative proceedings required by the contract disputes clause and to be exhausted before resort to judicial relief, tolls the running of the statute of limitations during its pendency. This important issue, a recurring one, should be considered by the Court.

3. The case poses the further important question whether, while an administrative proceeding under the standard contract disputes clause is pending, a protective suit must be instituted to stay the statute of limitations. In his opinion (App., *infra*, p. 20), Waterman, Circuit Judge, said that if a claimant is uncertain whether to resort to administrative proceedings or to institute judicial proceedings, he may protect himself by instituting a "protective suit" within the six-year period permitted by the Tucker Act, staying its progress until after a final administrative decision, and then bringing it forward if the administrative decision is adverse to him. In his dissenting opinion Judge Anderson (App., *infra*, p. 25) stated his belief that this was not a satisfactory solution to the problem since such a procedure would eventually lead to the defeat of many legitimate claims in the case of claimants unaware of protective actions and would have the unfortunate effect of increasing the burden of the district courts and as a matter of sound judicial administration had little to commend it. In *Northern Metal Co. v. United States*, *supra*, 350 F. 2d at page 839, Circuit Judge Freedman, writing for the Third Circuit, said that the dockets of the courts are too crowded for Congress to have intended that suits must be brought while the Govermental tribunal is engaged in ascertaining the facts which will determine whether the Government will pay the claim. In *United States v. Dickinson*, 331 U. S. 745, 749 (1947), the Court looked with disfavor upon piecemeal or premature litigation.

CONCLUSION

For the foregoing reasons it is respectfully submitted that a writ of certiorari should be granted.

EDWIN J. MCDERMOTT
Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 34—September Term, 1965.

(Argued October 5, 1965
Submitted to the *in banc*
court December 9, 1965 Decided June 22, 1966.)

Docket No. 29710

CROWN COAT FRONT CO., INC.,
Plaintiff-Appellant,

—v.—

UNITED STATES OF AMERICA,
Defendant-Appellee.

Before:

LUMBARD, *Chief Judge*, and
WATERMAN, MOORE, FRIENDLY, SMITH, KAUFMAN,
HAYS, ANDERSON and FEINBERG, *Circuit Judges*

Appeal from summary judgment, entered on Government's cross-motion, by the United States District Court for the Southern District of New York, Ryan, *Chief Judge*. Affirmed.

EDWIN J. MCDERMOTT, Philadelphia, Pa. (Jasper I. Manning, New York City, on the brief), *for Plaintiff-Appellant.*

ARTHUR M. HANDLER, Asst. U. S. Atty., Southern District of New York (Robert M. Morgenthau, U. S. Atty., and Alan G. Blumberg, Asst. U. S. Atty., Southern District of New York, on the brief), *for Defendant-Appellee.*

WATERMAN, *Circuit Judge* (with whom Judges Lumbard, Moore and Smith concur; Judge Friendly concurs in a separate opinion; Judge Anderson dissents in a separate opinion with whom Judges Kaufman, Hays, and Feinberg concur):

Plaintiff-appellant, on July 31, 1963, commenced its action against the United States in the United States District Court for the Southern District of New York. After the Government answered, pleading among other things that the action was time-barred, both parties moved for summary judgment. The court below granted the Government's motion and dismissed the complaint on the ground that the complaint had not been filed within six years after plaintiff's cause of action had accrued. 28 U.S.C. §2401(a). Plaintiff's appeal from the dismissal was heard by a panel of this court composed of Judges Waterman, Hays and Anderson, and while the case was *sub judice* before the panel the active circuit judges, on December 9, 1965 voted to consider the case *in banc* without further briefs or oral argument. The thrust of appellant's claim on appeal is that it was required fully to exhaust the administrative remedies it had agreed to pursue under the "disputes clause" of its contract before it could institute a suit against the United States, and that, having filed its suit within six years after the final decision in the matter by the Armed

Services Board of Contract Appeals, it had therefore filed within six years from the date that its right of action accrued.[1]

The Government, meeting this thrust, briefed its case on the sole issue whether, "pursuant to 28 U.S.C. §2401(a), a contractor's 'right of action' against the Government 'first accrues' (i) on the date of the alleged breach of contract by the Government, or (ii) on the date of a decision of the ASBCA denying the contractor's claim."

On May 14, 1956 the appellant entered into a contract with the Government to manufacture and deliver 89,786 felt canteen covers for a total agreed price of $60,691.76. The contract called for the use of mildew-resistant felt, made in accordance with certain established specifications, and provided for the submission of samples to the Government for testing and inspection, prior to manufacture. It also stipulated that if these samples did not meet specifications, the Government had "the right either to reject them or to require their correction." In addition, the agreement included the standard "disputes" clause which required

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[1] Appellant's brief sets forth the questions involved as follows:

"1. Where the 'Changes' clause of the contract provides that any failure to agree to a contract price adjustment is a dispute concerning a question of fact within the meaning of the 'Disputes' clause, and the 'Disputes' clause provides a procedure for the settlement of disputes arising under the contract, must not the contractor pursue such administrative remedy and secure a final decision thereof before he may institute suit? Negatived by the Court below.

"2. Where the plaintiff-appellant brings suit within the statutory period of six years after the final decision of the Armed Services Board of Contract Appeals under the 'Disputes' article of the contract, is plaintiff-appellant barred by the statute of limitations? Affirmed by the Court below."

In its reply brief, filed August 27, 1965, appellant reiterated the position that "Since plaintiff-appellant's suit was filed within six years from the date that its right of action accrued, it was timely," and that it "could not have sued until the decision of the Armed Services Board of Contract Appeals was rendered on February 28, 1963."

that, in the first instance, "any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided" by the Contracting Officer, from whose decision an appeal could be taken to the Armed Services Board of Contract Appeals (ASBCA).[2]

In accordance with the contract, appellant submitted four lots of felt samples for testing and inspection. After making laboratory tests in October and November, 1956, the Government rejected the samples. Thereupon the appellant requested, and the Government agreed to accept, the delivery of the canteen covers made from the non-conforming felt. A contract modification of $.005 less per unit —a total of $270.01—was agreed upon. Final delivery was made on December 14, 1956, and in all other respects the modified contract was fully performed.

The appellant claims that it was not until nearly five years later that it first learned the Government had im-

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[2] Such a clause is required for most government contracts. See 32 C. F. R. §7.103-12 and 32 C. F. R. §596.103-12. The clause in question in this case reads as follows:

> "Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith, be final and conclusive; provided that, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision."

properly tested the samples by submitting them to a different test than contemplated by the contract. On October 4, 1961, appellant's counsel wrote the Contracting Officer and demanded (1) a refund of the $270.01 price adjustment, and (2) an equitable adjustment for alleged increased extra production costs resulting from the initial rejection of the samples. On February 21, 1962, the Contracting Officer filed a decision in which he found that the Government had determined by "an established commercial test method" that the felt samples were nonconforming, and that the price reduction was proper. By opinion dated February 28, 1963, the ASBCA affirmed the Contracting Officer's denial of the claim. On July 31, 1963, five months after the ASBCA decision, but more than six years after the December 14, 1956 final delivery of canteen covers and presentation of the final invoice, appellant brought this suit under the Tucker Act, 28 U. S. C. §1346(a)(2), demanding the $270.01 and a sum "not exceeding $10,000 as the court may deem just and equitable" as compensation for the alleged extra production costs. As stated above, on cross-motions for summary judgment the district judge dismissed the complaint, holding that it had been time-barred by the six year limit [3] within

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[3] Section 1346(a)(2) of Title 28 U. S. Code derives from the so-called Tucker Act, the Act of March 3, 1887, 24 Stat. 505, c. 359, entitled "An act to provide for the bringing of suits against the Government of the United States." It presently reads:

"§1346. United States as defendant.

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * * * *

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

The Tucker Act was a comprehensive statute and also included

which Congress had authorized suspension of the Government's sovereign immunity from suit.[4] This appeal followed. We affirm the district court.

At the outset we agree with the finding of the court below that the alleged breach of the contract occurred at the very latest on December 14, 1956. That was the date of the final delivery of the canteen covers found to be nonconforming by the use of a test not contracted for. The right of action against the Government accrued at the time of the breach of the agreement by the Government and not at some later time. This would appear to be settled by *McMahon v. United States*, 342 U. S. 25, 72 Sup. Ct. 17, 96 L. Ed. 26 (1951) where the Supreme Court held in a much more appealing case that a seaman's claim for injuries arose when he was injured, and not when his claim had been finally administratively disallowed. The Court specifically rejected both the contention that the seaman could not sue until disallowance and that he had no cause of action until then. As the Court pointed out, even where statutes are to be con-

among other provisions a predecessor provision to the present 28 U. S. C. §2401(a), which now reads:

"§2401. Time for commencing action against United States.

(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases."

[4] We should make mention that the appellant, as a third string to its bow, attempted unsuccessfully to convince the district court that if, despite appellant's arguments otherwise, the six-year period began to run prior to the final administrative order, it began to run at a date later than December 14, 1956, on November 14, 1962. On this date the appellant received a refund from the Government of $646.06 which the ASBCA had determined in a different proceeding had been erroneously deducted as prompt payment discounts the Government should not have withheld. As will appear from our later discussion herein we agree with the district court that there is no merit to this contention.

strued liberally for the benefit of seamen, "it is equally true that statutes which waive immunity of the United States from suit are to be construed strictly in favor of the sovereign," *supra* at 27. Hence there the two year period of limitation built into the Suits in Admiralty Act [5] was held to begin to run as of the date of the injury.

Following *McMahon*, and after the passage of the Wunderlich Act, May 11, 1954, c. 199, 68 Stat. 81, 41 U. S. C. §§321-322, we, in *States Marine Corp. v. United States*, 283 F. 2d 776 (2 Cir. 1960) ruled against a libelant who claimed that the Government in December 1954 had breached a contract with it. We so ruled because the plaintiff's libel had not been filed until September 1957, even though during 15 months of the elapsed 33 months the contractor's claim had been under consideration, first by the Contracting Officer and then by the ASBCA, pursuant to a "Disputes" clause in the contract like the "Disputes" clause in appellant's contract.[6]

In fact, in *States Marine* we disposed of every claim appellant makes here. We held that the contractor should not await final decision of the ASBCA, in accord with his agreement to submit disputes to the agency officers, before commencing a protective suit, and that the time-bar period did not begin to run from the time of the final decision of the ASBCA, but, as the right of action accrued at the time of the breach, the time-bar began to run then. Moreover, we held, *supra* at 779, that the running of the time-bar was not tolled during the period when the claim was under administrative consideration.

Unless a reason exists for differently treating a suit brought pursuant to the permission granted by the Tucker Act from a suit brought pursuant to the permission granted by the Suits in Admiralty Act, we would be required to

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[5] Section 5 of the Suits in Admiralty Act, March 9, 1920, c. 95, 41 Stat. 525; 46 U. S. C. §745.

[6] See footnote 2, *supra*, and footnote 1 in *States Marine Corp. v. United States*, *supra* at 777.

overrule the law of this circuit laid down in *States Marine* and reaffirmed in *Isthmian S. S. Co. v. U. S.*, 302 F. 2d 69 (2 Cir. 1962) if we were to grant relief to the appellant here.

After final briefs had been filed by the parties the Third Circuit handed down its opinion in *Northern Metal Co. v. United States*, 350 F. 2d 833 (3 Cir. 1965). In that case *McMahon* was followed as to the fixing of the time when the two-year time-bar began to run, but, in direct conflict with the opinion of our court in *States Marine Corp. v. United States*, *supra*, and the decisions following it (including the district court opinion appealed from in *Northern Metal*, 230 F. Supp. 38 (E. D. Pa. 1964)) the Third Circuit held that the running of this time-bar was tolled during the pendency of the administrative proceedings. The issue of such a possible tolling of the Tucker Act's six-year time-bar had not been comprehended within the thrust of appellant's contentions, see footnote 1; and that fact, together with the square conflict of the two circuits relative to the tolling of the Suits in Admiralty Act's two-year time-bar, caused the panel *sua sponte* to refer adjudication of the case to all the active judges.[7]

Though the more recent Suits in Admiralty Act appears in the U. S. Code, section for section, much as it was when adopted in 1920, and the various provisions, section for section, of the eighty-year old Tucker Act are split up, here and there, in Title 28 of the Code, both Acts of Congress are grants of rights to sue the Government, which, being the sovereign, has full immunity from standing any suit at all. As such, both Acts set forth the kinds of claims that may be brought, the courts within which these specified claims are to be litigated, and the length of time within which these specified claims may be presented after the

[7] Appellant's action was commenced seven and one-half months after the six year jurisdictional limitation began to run, but if the time when administrative proceedings were pending is to be excluded from computation, the action was not time-barred.

cause of action arose, or accrued. These built-in limitations upon a more complete waiver of sovereign immunity spell out the ambit within which a would-be litigant seeking recovery from the sovereign must operate; in short, unless the would-be litigant operates within the area of the statutory grant, he is outside the jurisdiction the sovereign granted him, whether his cause of action is an impermissible one, he is in the wrong forum, or his time in which to act has expired.

Of the time-bar condition, we said in *States Marine:*

> "The two year time-bar of the Suits in Admiralty Act is unlike a time-bar period prescribed under an ordinary Statute of Limitations. Under an ordinary time-bar statute a claim is not extinguished after the statutory period has elapsed. It is only unenforceable. The time-bar of the Suits in Admiralty Act renders a claim against the United States not only unenforceable but extinguishes the claim itself, for when the sovereign, immune from suit, consented to be sued it was made a condition of the right to sue that suits so authorized had to be brought within the time-bar period. *McMahon v. United States*, 342 U. S. 25, 72 S. Ct. 17, 96 L. Ed. 26 (1951); *Sgambati v. United States*, 172 F. 2d 297, 298, *cert. denied*, 337 U. S. 938, 69 S. Ct. 1514, 93 L. Ed. 1743 (1949).
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> "It therefore follows that despite any maritime contractual agreements that parties may enter into with the United States such contractual agreements may not extend the time-bar period of two years prescribed by Section 5 of the Suits in Admiralty Act within which suit against the United States may be commenced. *United States v. Wessel, Duval & Co.*, 115 F. Supp. 678 (S. D. N. Y. 1953). Accord, *Atlantic Carriers, Inc. v. United States*, 131 F. Supp. 1 (S. D. N. Y. 1955). Jurisdiction to hear a case brought at a later date than two years after the cause of action arose cannot be awarded to the court by agreement." 283 F. 2d 776, 778.

What we said in *States Marine* about the time-bar of the Suits in Admiralty Act applies to the time-bar of the Tucker Act. A Tucker Act claim is extinguished when the limiting time expires. The claim being extinguished, the court's jurisdiction is gone, and jurisdiction to adjudicate the claim cannot be conferred upon the court by any agreement.

Prior to the passage of the Tucker Act in 1887, a suit could be brought against the United States in the Court of Claims provided it was brought within six years after the right to suit had accrued. The Tucker Act, adopted March 3, 1887, awarded a claimant whose claim against the Government was for a sum under $10,000 the right to present his claim to a specified United States District Court or Circuit Court "*Provided*, That no suit against the Government of the United States shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made." The provision of the Tucker Act granting grace to suitors to sue in a district court is now found in 28 U. S. C. §1346 (a) (2); the time-bar limitation is now found, since the 1948 edition of the Judicial Code, in 28 U. S. C. §2401 (a). These two subsections, each derived from the Tucker Act, should be read in connection with each other, Section 2401 (a) jurisdictionally limiting the exercise of the right to sue which the sovereign granted under 28 U. S. C. §1346 (a).

In October 1887, the same year that the Tucker Act was adopted, in deciding an appeal to the U. S. Supreme Court from a decision of the Court of Claims, Justice Harlan stated in *Finn v. United States*, 123 U. S. 227, 232-233, with reference to the permissive six-year period then, and now, applicable to that Court, the following:

> The general rule that limitation does not operate by its own force as a bar, but is a defence, and that the party making such a defence must plead the statute if he wishes the benefit of its provisions, has no application to suits in the Court of Claims against the

> United States. An individual may waive such a defence, either expressly or by failing to plead the statute; but the Government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the Court of Claims. Since the Government is not liable to be sued, as of right, by any claimant, and since it has assented to a judgment being rendered against it only in certain classes of cases, brought within a prescribed period after the cause of action accrued, a judgment in the Court of Claims for the amount of a claim which the record or evidence shows to be barred by the statute, would be erroneous.

In *United States v. Greathouse*, 166 U. S. 601 (1897) the Tucker Act was construed, again by Mr. Justice Harlan. *Finn v. United States* was cited and followed. The Court held:

> We may add that it was not contemplated that the *limitation* upon suits against the Government in the District and Circuit Courts of the United States should be different from that applicable to like suits in the Court of Claims. 166 U. S. at 606. (Emphasis supplied.)

Shortly thereafter, in *United States v. Wardwell*, 172 U. S. 48 (1898) the matter has been laid to rest in the Supreme Court for seventy years. Mr. Justice Brewer, beginning the opinion for the unanimous Court in that case stated, p. 52:

> Section 1069, Revised Statutes, is not merely a statute of limitations but also jurisdictional in its nature, and limiting the cases of which the Court of Claims can take cognizance. *Finn v. United States*, 123 U. S. 227.

This "jurisdictional" interpretation of the six-year time-

bar has never been overruled by the United States Supreme Court. And the Court, consistent with this interpretation, has rejected the contention that the jurisdictional time-bar should not begin to run until after an administrative denial of a claimant's claim when that contention has been advanced on the theory that there is no ground for a suit in court until all administrative remedies have been exhausted. *Soriano v. United States*, 352 U. S. 270, 77 Sup. Ct. 269, 1 L. Ed. 2d 306 (1957).

Appellant states in his complaint that the decision of the Armed Services Board of Contract Appeals "is not entitled to finality under 68 Stat. 81, 41 U. S. C. §§321-322 for the reasons that it was capricious, arbitrary and not supported by substantial evidence . . ." Apparently this reference to the so-called "Wunderlich" Act of 1954 was intended to nip in the bud any government defense that this ASBCA decision was a final disposition of plaintiff's claims. Of course this reference in its complaint brought pursuant to 28 U. S. C. §1346(a)(2) is not construable as pleading a separate right to review that administrative result, and, too, as we have above stated, the fact of this decision has no bearing upon the accrual of plaintiff's right to sue. *Soriano v. United States, supra; McMahon v. United States, supra; States Marine Corp. v. United States, supra; Northern Metal Co. v. United States, supra*, at 836.

Even as we cannot accept February 28, 1963 as the date when appellant's claim accrued we also cannot accept November 14, 1962 as the date of accrual, the date the Government refunded the erroneously withheld prompt payment discounts. A refunding adjustment made years after the final delivery of goods and the submission of a voucher for payment of those goods is not a "final voucher" submitted by the contractor, and, as pointed out by the court below, appellant's right to sue accrued when its work was completed and its final voucher was submitted. See *B-W Construction Company v. United States*, 100 Ct. Cl. 227 (1943); *Austin Engineering Co. v. United States*, 88 Ct. Cl.

559; *Acorn Decorating Corporation v. United States*, 146 Ct. Cl. 394, 174 F. Supp. 949 (1959). As was said by the Court of Claims in *Pink v. United States*, 85 Ct. Cl. 121, *cert. denied*, 303 U. S. 642, 58 Sup. Ct. 641, 82 L. Ed. 1102 (1938):

> . . . It has been repeatedly held by this court that under a contract to perform work, the completion and acceptance date starts the statute to run. It is the completion of the service called for under the contract, and not the date of any payment subsequently made.

Finally, it is clear that when Congress passed the Wunderlich Act that body did not intend to grant any new period of permissive delay within which the built-in six-year time-bar of the Tucker Act might be tolled. The House Committee Report is explicit on the point and demonstrates that Congress was fully aware of the established law and did not intend to affect it. H. R. Rep. No. 1380, 83rd Cong., 2d Sess. (1954), 2 U. S. Code & Ad. News, 2191, 2196 (1954), see *Cosmopolitan Mfg. Co. v. United States*, 297 F. 2d 546, 549 (Ct. Cl.), *cert. denied*, sub nom. *Arlene Coats v. United States*, 371 U. S. 818 (1962).

In view of the foregoing, we reiterate what we said in *States Marine Corp. v. United States*, *supra* at 779, and hold here that inasmuch as the six-year limitation is a restriction upon the jurisdiction of the district court, the running of the six-year time-bar could not be extended by the Disputes Clause agreement of the parties, or tolled during the period that appellant's claim was being administratively considered.

In general, see *United States v. Utah Construction and Mining Co.*, —— U. S. —— (June 6, 1966) and *United States v. Carlo Bianchi & Co.*, 373 U. S. 709 (1963), if a claimant is uncertain whether he should proceed at once with a Tucker Act suit or first submit a dispute, pursuant to his agreement, to the ASBCA, he may always protect himself by instituting a "protective suit" within the six-

year period permitted by the Tucker Act, staying its progress until after a final administrative decision, and then bringing it forward if the administrative decision is adverse to him.

The judgment below is affirmed.

FRIENDLY, *Circuit Judge* (concurring):

If the issue here were now arising in this court for the first time, I might well be persuaded to the position taken by Judge Freedman in *Northern Metal Co. v. United States*, 350 F. 2d 833 (3 Cir. 1965) and by my brother Anderson in dissent, rather than to that which we adopted in *States Marine Corp. v. United States*, 283 F. 2d 776 (2 Cir. 1960). But the issue is a close one on any view, there is much to be said for *States Marine*, and it derives considerable support from the language of *Soriano v. United States*, 352 U. S. 270, 274-75 (1957). That we are sitting *in banc* does not relieve us of the judicial obligation to pay proper heed to precedent; the question still is "not what we would hold if we now took a fresh look but whether we should take that fresh look," *Mississippi River Fuel Corp. v. United States*, 314 F. 2d 953, 958 (Ct. Cl. 1963) (concurring opinion of Davis, *J.*). Judge Davis' illuminating opinion identifies several factors that may justify this; when none of these exists, "respect for an existing precedent is counselled by all those many facets of stability-plus-economy which are embodied in the principle of *stare decisis*." The only thing in the picture now that was not before the *States Marine* panel six years ago is the Third Circuit's opinion in *Northern Metal;* valuable as that is, it can hardly be rated, to use Judge Davis' phrase, as "an intervening development in the law, or in critical comment, which unlocks new corridors." What it does do is to provide a ready handle for opening the door to correction, if we are wrong, by the only tribunal that can settle the issue once and for all. Supreme Court Rule 19.

ANDERSON, *Circuit Judge* (dissenting):

I dissent. I do, however, agree with the majority that the period of limitations began to run on the date of the alleged breach of the contract. The claim for breach accrued at the latest on December 14, 1956, the date of the final delivery, which was more than six years prior to the commencement of this action. The Supreme Court decided in *McMahon v. United States*, 342 U. S. 25 (1951) that a seaman's claim for injuries accrued at the date of the injury, and not at the date when his claim was rejected by administrative officers.[1] A similar result has been reached in our own circuit in *States Marine Corporation of Delaware v. United States*, 283 F. 2d 776, 778 (2d Cir. 1960), and more recently by the Third Circuit in *Northern Metal Co. v. United States*, 350 F. 2d 833 (3d Cir. 1965).

[1] In *McMahon* the Supreme Court left open the question of whether the statutory period there in question had been tolled, since a decision on that point would not have affected the result. 342 U. S. at 28.

I am of the opinion, however, that the decision below should be reversed because the limitations period was tolled during the pendency of the administrative proceedings required by the disputes clause.

As the Supreme Court stated in *Burnett v. New York Cent. R. Co.*, 380 U. S. 424, at 426 (1965),

> "The basic question to be answered in determining whether, under a given set of facts, a statute of limitations is to be tolled, is one 'of legislative intent whether the right shall be enforceable . . . after the prescribed time.'"

The Court went on to say at 427,

> "In order to determine congressional intent, we must examine the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act."

The statutes of limitations are statutes of repose, designed to put an end to litigation.

> "The primary consideration underlying such legislation is undoubtedly one of fairness to the defendant. There comes a time when he ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim when 'evidence has been lost, memories have faded, and witnesses have disappeared.'" Note, 63 Harv. L. Rev. 1177, at 1185 (1950).

See *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U. S. 342, at 348-349 (1944).

> "This policy of repose, designed to protect defendants, is frequently outweighed, however, where the interests of justice require vindication of the plaintiff's rights."

Burnett v. New York Cent. R. Co., supra, at 428. Thus courts have engrafted numerous exceptions upon statutory periods of limitations. See, e.g., *Urie v. Thompson*, 337 U. S. 163 (1949); *Bailey v. Glover*, 88 U. S. (21 Wall.) 342 (1874). The otherwise mechanical results, to which the unbated application of the limitations periods would lead, have thus been mitigated by familiar principles such as the one that a period of limitations is tolled until fraud is discovered. *Bailey v. Glover, supra.* Similarly it is accepted that,

> "Where the plaintiff is prevented from finding timely suit by force of law, it is manifestly unjust to penalize him by barring the suit." 63 Harv. L. Rev. at 1233.

And in *Urie v. Thompson, supra*, the Supreme Court recognized that a claim for an injury caused by a slow and continuing process was not barred if brought within three years of *discovery* of the ailment. Finally, in other instances it is recognized that the principles of estoppel may

prevent a defendant from raising the defense of the statute of limitations, "when his representations or conduct have induced the plaintiff to forbear from prosecuting his known cause of action, and the limitations period has expired while the plaintiff continues to forbear." 63 Harv. L. Rev. at 1222. The application of these principles should not depend upon whether the statute of limitations involved is one which may be characterized as "substantive" or "procedural." Nor does the fact that a newly created right of action sprang from a waiver of sovereign immunity render the statute of limitations impervious to the application of those same mitigating considerations. In every case inquiry should be directed to the basic question of "legislative intent." *Burnett v. New York Cent. R. Co., supra.* By making administrative proceedings a mandatory prerequisite to the seeking of relief in such cases from the courts, Congress did not intend that the statute of limitations would run during the pendency of those administrative hearings and deliberations.

Looking to the scheme of the Tucker Act, 28 U. S. C. §1346(a)(2) (1964 ed.), and the liberal purpose which it evinces to permit suits based upon contract claims to be brought against the Government, it would be anomalous to hold that the Government, through its power to make regulations, could require the inclusion in all of its thousands of procurement contracts of a mandatory provision that claims must first be processed through its administrative channels, and, by proceedings long drawn out, effectively defeat the rights of claimants to present their claims to a court of law. There is, of course, no doubt that the appellant was required first to proceed with, and exhaust, its administrative remedies before it could sue under the Tucker Act. See, e.g., *United States v. Joseph A. Holpuch Co.*, 328 U. S. 234 (1946); and *Northern Metal Co. v. United States, supra,* at 839, which says,

> "Since the Government through its contracting officer and the Armed Services Board of Contract Ap-

peals not only was aware of the claim but was engaged in deciding its merits, it would be harsh and out of harmony with the purpose and intention of Congress to hold that the statutory time ran during the pendency of the administrative proceedings."

In this kind of case many of the factors which usually provide the basis for the rationale of the limitations periods are absent. By bringing its claim to the contracting officer within six years of its accrual, the appellant effectively gave the Government all the notice to which it was entitled. The administrative proceedings which were held had the effect of recording and preserving all of the relevant evidence. There is, therefore, none of the dangers against which the time bars are designed to protect. The Government is not being called upon to defend a claim after "evidence has been lost, memories have faded, and the witnesses have disappeared." *Order of Railroad Telegraphers v. Railway Express Agency, Inc., supra,* at 349. Indeed, prejudice will result only if the suit is not permitted, in the event of which the party to suffer will be the plaintiff. It is my opinion that *States Marine Corporation of Delaware v. United States,* 283 F. 2d 776 (2d Cir. 1960), which in cases of this kind operates harshly and unjustly, should be overruled.

I do not believe that the contractor's ability to bring a protective suit is a satisfactory solution to the problem. Such a procedure would inevitably lead to the defeat of many legitimate claims in the cases of claimants who are unaware of the need for bringing such protective actions. Furthermore, it would have the unfortunate effect of increasing the burden of the district courts by causing still more crowding of already crowded dockets with lawsuits which will languish for years during the pendency of administrative proceedings, and which in all probability will never come up for trial. Therefore, as a matter of sound judicial administration the requirement that a protective suit be commenced within the period of limitations has little to commend it.

The statutory period of limitations (28 U. S. C. §2401(a) (1964 ed.)), which is applicable to the Tucker Act, should be held to be tolled during the pendency of the administrative proceedings required by the "disputes" clause.[2] This does not mean that a contractor may indefinitely put off the time of suit. "On the contrary, the time would run during the contractor's delay in presenting the dispute and would be tolled only during its pendency before the contracting officer and the Armed Services Board of Contract Appeals, a period which is in the control of the Government's employees and not of the contractor." *Northern Metal Co. v. United States, supra,* at 839. Because the appellant commenced its administrative petition within the six year period and because its suit, if allowance be made for a tolling of the statute during the administrative proceedings, was brought within the statutory period, the present action was timely brought. ". . . [P]laintiff has not slept on his rights but, rather, has been prevented from asserting them." *Burnett v. New York Cent. R. Co., supra,* at 429.

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[2] Cf. *Carnation Co. v. Pacific Westbound Conference,* 383 U. S. 213 (1966), where, in another context, the Supreme Court, in a dictum stating that it was error to dismiss an action which the Court of Appeals had decided should have been presented first to an administrative tribunal, noted that:

> "Such claims are subject to the Statute of Limitations and are likely to be barred by the time that the . . . [administrative agency] acts. Therefore, we believe that the Court of Appeals should have stayed the action instead of dismissing it." 383 U. S. at 223.

While the subject matter in *Carnation* is certainly different from the one which is now before our court, nevertheless the same considerations apply and dictate that the Statute of Limitations should be tolled during the pendency of the administrative proceedings before the ASBCA.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CROWN COAT FRONT CO., INC.

v.

UNITED STATES OF AMERICA

Endorsement

63 Civ. 2281

This suit seeks to recover for an alleged breach of Armed Services contract, No. QM-7796 of May 14, 1956, for canteen covers. Plaintiff and defendant both move for summary judgment.

Complaint is dismissed because suit is barred by the Statute of Limitations.

The canteen covers contracted for were to be lined with mildew resistant felt of certain specifications. The contract also provided that the Government could inspect and test "raw materials—and end products" (General Provisions, page 1) prior to final acceptance, and when found to be defective in "material or workmanship or otherwise not in conformity with the requirements of this contract", the "Government shall have the right either to reject them or to require their correction." (General Provisions, page 1). Some samples of felt, purchased by plaintiff for use on the contract from Western Felt Works, were rejected after test by defendant for not containing contract quantities of various mildew inhibitors. Before defendant would allow plaintiff to use the rejected felt on the contract, defendant required plaintiff to consent to contract price reductions of $270.01. Final delivery of the canteens was made by plaintiff on December 14, 1956. (The contract stated that final delivery was to be made by October 12, 1956.)

Plaintiff alleges that it was not until March 20, 1959, that "defendant informed plaintiff" that it had performed Colorimetric and Ferric Chloride tests in determining the percentage of mildew inhibitor but had not performed a

Parr Chloride test. Plaintiff contends that the above two tests were not provided for by contract QM-7796, and, therefore, there was a change in contract specifications and a breach of contract. After being told which tests were performed on the samples, plaintiff exercised its rights under the "Changes" Clause of contract QM-7796 and demanded that the Contracting Officer grant a refund of the price reductions and compensation for increased costs occasioned by the delay resulting from defendant's rejection of the samples.

Paragraph two of contract QM-7796 provides:

> "*Changes.* The Contracting Officer may at any time . . . make changes within the general scope of this contract, in any one or more of the following: (1) . . . specifications, where the supplies to be furnished are to be specially manufactured for the Government in accordance therewith; . . . If any such change causes an increase or decrease in the cost of . . . performance or the contract, an equitable adjustment shall be made in the contract price . . . *provided, however*, That the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes". . . ."

On February 21, 1962, the Contracting Officer rendered findings in which he stated that the Government had employed "an established commercial method" in testing for the mildew inhibitor content of the felt and held that plaintiff was not entitled to an increase in price under the contract. Pursuant to the "Disputes" Clause, paragraph 12 of contract QM-7796, plaintiff filed an appeal to the Armed Services Board of Contract Appeals (ASBCA),

which held a full hearing and on February 28, 1968 rendered a decision holding that plaintiff was not entitled to increased compensation.

> "12. *Disputes.* Except as otherwise provided in this contract, any dispute concerning a *question of fact* arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing etc. . . . Within 30 days from the date of receipt of such copy, the contractor may appeal . . . . to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall be final and conclusive. . . ."

Plaintiff now claims that if is entitled to an equitable adjustment of the contract price and demands judgment against defendant for $9500 or such amount not exceeding $10,000 as this Court may deem just and equitable. Plaintiff contends that the decision of the ASBCA is not entitled to finality because the question before the Court is not properly within the "Disputes" Clause, and because the ASBCA's action was "capricious, arbitrary, and not supported by substantial evidence, and concerned questions of law."

We do not deem it necessary to determine if the question before us is properly within the "Disputes" Clause or to examine the record of the proceedings before the ASBCA, because the action is barred by the Statute of Limitations.

28 U.S.C. §2401(a) provides:

> "§2401. *Time for commencing action against the United States.*
>
> (a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. . . ."

The essence of plaintiff's complaint is based on the alleged use by the Government of unwarranted tests and the

consequent rejection of felt. This inspection and rejection occurred prior to October 1956; however, neither party contends that this is the date when the claim should be deemed to accrue.

Defendant urges that the claim sued on legally accrued at the latest on December 14, 1956, when plaintiff completed all deliveries of canteen covers under the contract, and that, therefore, this action, filed on July 31, 1963, is barred by the six-year Statute of Limitations.

Plaintiff contends, however, that if this suit be predicated on a question of law the claim did not accrue until November 14, 1962, when defendant made the last payment under the contract, and if the action is based on a question of fact and is within the "Disputes" Clause, plaintiff had no enforceable claim until February 28, 1963, when the ASBCA rendered its decision. Neither of plaintiff's contentions has merit.

The first contention is based on the fact that defendant transmitted to plaintiff certain "prompt payment discounts", which the ASBCA (in a different hearing than that discussed above) held that defendant should not have withheld from plaintiff. Plaintiff cites *B-W Construction Company v. United States*, 100 Ct. Cl. 227 (1943) to support his contention that the Statute of Limitations did not begin to run until the Government paid the above "prompt payment discounts". The Court in *B-W Construction Company* stated that:

> "The defendant says that the statute began to run on the date the defendant occupied the building, but it is clear under our decisions that it did not begin to run until the work was finally completed and final voucher was presented. *Pink v. United States*, 85 Ct. Cl. 121; *Austin Engineering Co. v. United States*, 88 Ct. Cl. 559."

A "final voucher was presented" when plaintiff completed work and deliveries on December 14, 1956. The dis-

pute over manner of payments cannot be considered as affecting the time when a "final voucher was presented."

Another case cited by plaintiff bears out the above observation. In *Acorn Decorating Corporation v. United States*, 146 Ct.Cl. 394, 174 F. Supp. 949 (1959), the Court stated (at 951, 398):

> "It should also be noted that final payment was made to plaintiff more than six years from the date of the suit with the exception of $100. Plaintiff contends that since the $100 was finally paid within the 6 year period its claim accrued as of that time, citing *B-W Construction Co. v. United States*, 100 C. Cls. 227 and *Austin Engineering Co. v. United States*, 88 C. Cls. 559. There is no merit in this contention. The gravamen of these cases is that a cause of action accrues upon a contract when the work is completed and a final voucher presented. See also *Pink v. United States*, 85 C. Cls. 121, cert. denied 303 U.S. 642, wherein it was said:
> "'. . . It has been repeatedly held by this court that under a contract to perform work, the completion and acceptance date starts the statute to run. It is the completion of the service called for under the contract, and not the date of any payment subsequently made.'"

We conclude that if this claim sued upon is based on a question of law, it is barred by the Statute of Limitations, because plaintiff completed the work, presented its final voucher, and the work was accepted by the Government more than six years prior to filing suit.

Likewise, if the suit is based on a question of fact and is within the "Disputes" Clause, we find that the Statute of Limitations was not tolled during the period of administrative procedures. Plaintiff cites *Acorn Decorating Corporation v. United States, supra*, to support his contention. In the case cited, however, the plaintiff had not exhausted his administrative remedies because he failed to appeal an adverse decision to the Secretary of the Army. Therefore, the

Court stated that even if plaintiff's contention that the claim did not accrue until the "adverse decision was rendered" by an administrative body were true, plaintiff was still barred for not exhausting his administrative remedies. Contrary to plaintiff's contention, the law is that the pursuit of an administrative remedy does not toll the Statute of Limitations. See *States Marine Corp. of Delaware v. United States*, 283 F. 2d 776, 779 (2d Cir. 1960); *Cisatlantic Corp. v. Brownell*, 131 F. Supp. 406 (S. D. N. Y. 1953), aff'd per curiam, 222 F. 2d 957 (2d Cir. 1955); *Leonick v. Jones & Laughlin Steel Corp.*, 151 F. Supp. 795 (E. D. N. Y. 1957), aff'd 258 F. 2d 48 (2d Cir. 1958); *Fattore v. United States* 312 F. 2d 797 (Ct. Cl. 1963). In the *States Marine Corp.* case, the Court held that plaintiff's claim was barred by the two-year time-bar of the Suits in Admiralty Act even though the delay in bringing the action resulted from the pursuit of administrative adjudication, which was required by plaintiff's contract with the Government. Included in the contract was almost the identical "Disputes" Clause involved in the contract herein. *States Marine Corp.* submitted its claim to the Contracting Officer and then appealed to the ASBCA just as has been done here.

We find that this suit is barred by the Statute of Limitations and is dismissed. The Clerk is directed to forthwith enter judgment of dismissal on the merits with costs; and it is so ordered.

SYLVESTER J. RYAN
U.S.D.J.

Dated: January 29, 1965.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 371

CROWN COAT FRONT CO., INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

We do not oppose the petition. There is a direct conflict between the *en banc* decision of the court of appeals in this case (following that court's earlier decision in *States Marine Corp.* v. *United States*, 283 F. 2d 776 (C.A. 2)) and the decision of the Court of Appeals for the Third Circuit in *Northern Metal Co.* v. *United States*, 350 F. 2d 833. The question involved is also recurrent. The issue is whether the running of a statute of limitations upon suits against the United States is suspended or "tolled" while a government contractor seeks administrative relief pursuant to the disputes clause agreement of his con-

228-652—66

tract.[1] The Third Circuit has held that the running of the limitations period is suspended; the Second Circuit has held that it is not.

1. Petitioner contracted with the government to manufacture canteen covers of mildew-resistant felt for a total price of $60,691.76. Under the contract, petitioner was required to submit sample covers to the government for testing and inspection, and the government had the right either to reject those not meeting contract specifications or to require their correction. The contract also contained a standard disputes clause requiring the contracting officer to decide "any dispute concerning a question of fact arising under" the contract and providing for appeal of his decision to the Armed Services Board of Contract Appeals (ASBCA) (Pet. App. 10–11).[2] After the government rejected four lots of sample covers, petitioner requested it to accept delivery of the non-conforming covers in consideration of a price reduction of one-half cent per cover. The contract was modified to reflect the reduction, and final delivery of the canteen covers was made on December 14, 1956.

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[1] The statute of limitations involved in the Third Circuit's *Northern Metal* decision and the earlier Second Circuit decision in *States Marine* was the two-year Suits in Admiralty Act provision, whereas the case at bar is concerned with the Tucker Act six-year provision, 28 U.S.C. 2401(a). As the court of appeals pointed out here, however (Pet. App. 15–17), the considerations in regard to the tolling of both statutes during administrative proceedings under the disputes clause are identical in all relevant respects.

[2] The standard contract disputes clause has recently been the subject of consideration by this Court in *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, and *United States* v. *Utah Construction and Mining Co.*, 384 U.S. 394.

Almost five years later, on October 4, 1961, petitioner wrote the contracting officer claiming that the government had improperly tested the samples and demanding a refund of the price adjustment plus an equitable adjustment for extra production costs allegedly resulting from the government's rejection of the samples. On February 21, 1962, the contracting officer ruled against petitioner on its claim, holding that proper testing methods had been employed. On February 28, 1963, the ASBCA affirmed his decision.

On July 31, 1963—more than six years after completion of performance of the contract by final delivery on December 14, 1956, but within five months of the ASBCA decision—petitioner commenced this action in the district court. Relying on the Second Circuit's decision in *States Marine Corp.* v. *United States,* 283 F. 2d 776, the district court dismissed the complaint, holding the suit barred by the applicable six-year statute of limitations of the Tucker Act, 28 U.S.C. 2401(a) (Pet. App. 27). The district court's decision was affirmed, five votes to four, by the court of appeals sitting *en banc.* Judge Waterman, joined by Chief Judge Lumbard and Judges Moore and Smith, adhered to the position taken in *States Marine* that the statute of limitations could not be tolled while disputes clause procedures were being followed. The court held that, in view of the jurisdictional nature of statutes of limitations regulating suits against the United States, the limitations period could not be extended by tolling in the absence of express congressional authorization. See *Soriano* v. *United States,*

352 U.S. 270, 275–276.[3] In a separate concurring opinion, Judge Friendly stated that he joined in this result because of the precedent of *States Marine;* however, "[i]f the issue here were now arising in this court for the first time, I might well be persuaded to the position taken" by the Third Circuit in *Northern Metal Co.* v. *United States,* 350 F. 2d 833, holding the running of the statute of limitations to be suspended during the pendency of disputes clause administrative proceedings (Pet. App. 21). Judge Anderson, joined by Judges Kaufman, Hays, and Feinberg, dissented. In their view the decision of *States Marine* should have been overruled and the decision in *Northern Metal* followed.

2. The decision below is thus in direct conflict with the decision of the Third Circuit in *Northern Metal Co.* v. *United States, supra.*[4] In that case, the court inferred that Congress intended the limitations period to be suspended or "tolled" while the dispute was pending before the contracting officer and the ASBCA. The court reasoned that "[s]ince the Government through its contracting officer and the Armed Services Board of Contract Appeals not only was aware of the claim but was engaged in deciding its merits, it would be harsh and out of harmony with the purpose and intention of Congress to hold that the statutory time

[3] Congress expressly provided in the Tucker Act for tolling in the case of persons "under a legal disability or beyond the seas at the time the claim accrues." 28 U.S.C. 2401(a), 2501.

[4] If the time when administrative proceedings were pending is excluded from computation, the six-year period would not have run here. Pet. App. 15 n. 7.

ran during the pendency of the administrative proceedings."'[5] 350 F. 2d at 839.

3. The standard contract disputes clause, requiring primary resort to administrative proceedings for the resolution of a large class of contract disputes (see *United States* v. *Utah Construction and Mining Co.*, 384 U.S. 394), is present in virtually all government contracts. The issue here is therefore a recurring one and its settlement by this Court appears appropriate.

THURGOOD MARSHALL,
Solicitor General.

AUGUST 1966.

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[5] Both the Second and Third Circuits rejected alternative arguments by the contractors that their causes of action did not actually accrue until after the ASBCA rendered a final decision on their claims. Relying on this Court's decision in *McMahon* v. *United States*, 342 U.S. 25, both courts held that the right of action accrued at the time of the alleged breach and not upon its administrative disallowance. See the decision below (Pet. App. 13); *States Marine Corp. of Delaware* v. *United States*, 283 F. 2d at 778; and *Northern Metal Co.* v. *United States*, 350 F. 2d at 836. Petitioner does not claim in this Court that the court below erred in this holding and, plainly, there is no conflict in decisions on the point.

U.S. GOVERNMENT PRINTING OFFICE: 1966

Supreme Court of the United States

No. 342

October Term, 1956

CROWN COAT FRONT CO., INC., Petitioner

v.

UNITED STATES

BRIEF FOR THE PETITIONER

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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TABLE OF CONTENTS

CASES CITED

CASES CITED—*Continued*

IN THE

Supreme Court of the United States

No. 371

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v.

UNITED STATES

BRIEF FOR THE PETITIONER

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Opinions Below

The Opinion of the Court of Appeals (R. 14) is reported at 363 F. 2d 407 (1966). The Opinion of the District Court (R. 7) is not reported.

Jurisdiction

The judgment of the Court of Appeals was entered June 22, 1966 (R. 33). The petition for a writ of certiorari was filed July 20, 1966 and was granted October 10, 1966 (R. 34). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

Statutory and Contract Provisions Involved

1. The Act of June 25, 1948, 62 Stat. 971, 28 U.S.C. 2401(a) provides:

> "§2401. Time for commencing action against United States.
>
> "(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases."

2. The Disputes clause of the contract provides (R. 17):

> "Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith, be final and conclusive; provided that, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its

appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision."

Questions Presented

1. Whether the six-year limitation period for district court action (28 U.S.C. 2401(a)) was tolled during the pendency of the mandatory contract disputes clause administrative proceeding?

2. Whether the limitation period was extended until the mandatory administrative proceeding was concluded?

3. Whether a "protective suit" must be filed to stay the running of the limitation period?

Statement of the Case

On May 14, 1956 petitioner contracted with the government to manufacture canteen covers of mildew resistant felt for a total price of $60,691.76. Petitioner was required by the contract to submit samples to the government for testing and inspection prior to manufacture; and the government had the right either to reject or to require correction of samples which did not meet specifications. The contract also contained a standard "Disputes" clause which required the contracting officer to decide "any dispute concerning a question of fact arising under this contract" and provided for appeal of his decision to the Secretary and for decision by the Secretary or his authorized representative, here the Armed Services Board of Contract Appeals (ASBCA) (R. 17). After making laboratory tests of four lots of samples submitted by petitioner for testing and inspection, the government rejected the samples and upon a price reduction of one-half cent per cover—a total of

$270.01—the nonconforming covers were accepted by the government and final delivery of the canteen covers was made December 14, 1956 (R. 17). Petitioner claims that it was not until nearly five years later that it first learned that the government had improperly tested the samples by submitting them to different tests than contemplated by the contract (R. 2). On October 4, 1961 petitioner wrote the contracting officer and demanded a refund of the $270.01 price adjustment and an equitable adjustment for increased production costs resulting from the initial rejection of the samples (R. 17). On February 21, 1962 the contracting officer ruled against petitioner on its claim, finding that the government had determined by "an established commercial test method" that the felt samples were nonconforming and that the price reduction was proper. On February 28, 1963 the ASBCA affirmed his decision (R. 18).

On July 31, 1963 petitioner commenced this action in the District Court. Relying on the Second Circuit's decision in *States Marine Corp. of Delaware v. United States*, 283 F. 2d 776 (2d Cir. 1960), the District Court dismissed the complaint holding the suit was barred by the six-year statute of limitations of the Tucker Act, 28 U.S.C. 2401(a). The District Court's decision was affirmed by the Court of Appeals sitting en banc, five votes to four. Judge Waterman joined by Chief Judge Lumbard and Judges Moore and Smith were for affirmance on authority of *States Marine* (R. 15). Judge Friendly concurred in a separate opinion on the precedent of *States Marine*, however, stating, "If the issue here were now arising in this court for the first time, I might well be persuaded to the position taken by Judge Freedman in *Northern Metal Co. v. United States*, 350 F. 2d 833 (3 Cir. 1965) and by my brother Anderson in dissent" (R. 27). Judge Anderson, joined by Judges Kaufman, Hays and Feinberg, dissented saying, "I am of the opinion that the decision below should be reversed because the limitations period was tolled during the pendency of the administrative proceedings required by the disputes

clause" (R. 28), and said, "It is my opinion that *States Marine Corporation of Delaware v. United States*, 283 F. 2d 776 (2d Cir. 1960), which in cases of this kind operates harshly and unjustly, should be overruled" (R. 31). Judge Waterman stated that a claimant should protect himself by instituting a "protective suit" within the six-year period (R. 26) but Judge Anderson dissented on this issue (R. 21).

Argument

1. *The Statutory Limitations Period Was Tolled by the Mandatory Administrative Proceeding.*

The standard disputes clause of this contract stipulated that "any dispute concerning a question of fact arising under this contract . . . shall be decided by the Contracting Officer. . . . Within 30 days . . . the Contractor may appeal . . . to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall . . . be final and conclusive." Petitioner was required to pursue the "Disputes" clause procedure before bringing this suit, and had he failed to do so, his suit would have been dismissed: *United States v. Holpuch Co.*, 328 U. S. 234, 239, 243 (1946); *United States v. Blair*, 321 U. S. 730, 734-737 (1944). The administrative proceeding is mandatory.

Although, generally, statutes of limitation are regarded as statutes of repose, Courts have been compelled to recognize the right to sue even though by the clock alone the time has run. Thus, the statute of limitations does not begin to run against an action for fraud until its discovery by plaintiff: *Bailey v. Glover*, 88 U. S. (21 Wall.) 342 (1875). The statute has been held to be suspended during the period when plaintiff could not be aware of the accumulating injury resulting from defendant's wrongful conduct: *Urie v. Thompson*, 337 U. S. 163 (1949). The modern view is to hold that the period of limitations is tolled because of the

plaintiff's innocence even though defendant had no knowledge that the claim would be made against him, and that rule has been applied where the time limitation is fixed by the same statute which creates the cause of action. Thus in *Glus v. Brooklyn Eastern Terminal*, 359 U. S. 231 (1959), the three-year statutory period of limitations fixed by the Federal Employers' Liability Act was held inapplicable because defendant had fraudulently induced plaintiff's delay by representing that he had seven years in which to sue. In *Burnett v. New York Central R. Co.*, 380 U. S. 424 (1965), the Court held that where a timely FELA action brought in a state court having jurisdiction was dismissed for improper venue, the FELA statute of limitations was tolled during the pendency of the state suit. And see *Telegraphers v. Ry. Express Agency*, 321 U. S. 342 (1944).

There is only a limited scope of judicial review of agency disputes clause decisions under the Wunderlich Act, May 11, 1954, C. 199, §1, 68 Stat. 81, 41 U.S.C. §321. See *United States v. Utah Constr. Co.*, 384 U. S. 394 (1966); *United States v. Grace & Sons*, 384 U. S. 424 (1966); *United States v. Bianchi & Co.*, 373 U. S. 709 (1963). While it cannot be said that the Government has misled petitioner, its procurement requirements established a method for preliminary determination of disputes and required petitioner to pursue this administrative review. Since the Government through its contracting officer and the ASBCA not only was aware of the claim but was engaged in deciding its merits, it would be harsh and out of harmony with the purpose and intention of Congress to hold that the statutory time ran during the pendency of the administrative proceeding: *Northern Metal Co. v. United States*, supra, 350 F. 2d at pages 836-839; *Crown Coat Front Co. v. United States*, supra, dissenting opinion, 363 F. 2d at p. 416; *Nager Elec. Co. v. United States*, Ct. Cl. No. 348-64, decided October 14, 1966, slip op. 24-25.

In *Nager Elec. Co. v. United States*, supra, Judge Davis observed, at slip op. 13, that *Soriano v. United States*,

352 U. S. 270, 274-275 (1957), relied upon by Judge Waterman in the opinion below (R. 25) and referred to by Judge Friendly in his concurring opinion (R. 27) involved pursuit of a non-mandatory administrative remedy; and at slip op. 15, that *McMahon v. United States*, 342 U. S. 25 (1951), relied upon by Judge Waterman in the opinion below (R. 19) involved only a procedural step. Even there the Court noted, *McMahon v. United States*, supra, 342 U. S. at p. 28: "We find it inappropriate to consider whether the statute of limitations is tolled for a maximum of 60 days while a claim is pending and not disallowed either by notice or by operation of the regulations."

It cannot any longer be said that by the "Disputes" clause the parties have contracted for settlement of disputes in an *arbitral* manner: *United States v. Wunderlich*, 342 U. S. 98, 100 (1951), since the Court has more recently declared in *United States v. Utah Constr. Co.*, 384 U. S. 394, 442 (1966) that the Armed Services Board of Contract Appeals acts in a *judicial* capacity when it resolves disputed issues of fact.

It is difficult to reconcile the decision below with the Wunderlich Act, supra. Under that statute no suit may be maintained unless the contractor can say that the final administrative decision is arbitrary, capricious, fraudulent, grossly erroneous, or not supported by substantial evidence. Petitioner cannot aver any of these factors until the administrative decision has actually been rendered: *United States v. Utah Constr. Co.*, supra, 384 U. S. at p. 399. The Wunderlich Act requires the administrative proceeding as a necessary step before judicial relief. It would be unreasonable to suppose that the Congress enacted the Wunderlich Act without recognizing that the administrative proceeding required would toll the running of the statute of limitations: *Nager Elec. Co. v. United States*, supra, slip op. 16, n. 22.

If the time when the administrative proceeding was pending is to be excluded from the computation of the six-year limitation, this action is not time-barred (R. 21, n. 7).

It is respectfully submitted that the statute of limitations was tolled during the pendency of the mandatory "Disputes" clause administrative proceeding. It next remains to determine whether the statute was extended by the mandatory administrative proceeding.

2. *The Statutory Limitations Period Was Extended by the Mandatory Administrative Proceeding.*

Since the decision below, the Court of Claims, per Davis, J., on October 14, 1966, decided *Nager Elec. Co. v. United States*, Ct. Cl. No. 348-64, ruling that the limitations statute commences to run upon the final administrative decision under the "Disputes" clause.

Petitioner argued before the Court of Appeals that the statute of limitations did not run until the mandatory administrative determination was rendered by the ASBCA (R. 15-16).

In the Court of Appeals petitioner cited *Cosmopolitan Mfg. Co. v. United States*, 156 Ct. Cl. 142, 144, 297 F. 2d 546, 547 (1962), cert. denied 271 U. S. 818 (1962); *Electric Boat Co. v. United States*, 81 Ct. Cl. 361, 367-368 (1953), cert. denied 297 U. S. 710 (1936); see *Nager Elec. Co. v. United States*, supra, slip op. 6.

The "Disputes" clause here involved is mandatory and since petitioner's claim was required to be processed thereunder, petitioner's claim did not accrue upon completion of deliveries under the contract, and its judicial claim did not ripen so as to trigger limitations until the duly invoked decision of the ASBCA was rendered. See *United States v. Clark*, 96 U. S. 37, 43-44 (1878); *United States v. Taylor*, 104 U. S. 216, 222 (1881).

Petitioner or any other contractor has no right to demand money on a claim until the administrative procedure is finished. He has bound himself to that course, and, in effect, has agreed to convert a breach of contract claim to one for relief under the contract: *United States v. Utah Constr. Co.*, 384 U. S. 394, 404 n. 6 (1966). Until

the ASBCA acted in this case, there was no judicially cognizable injury to petitioner and no claim for court relief by petitioner. Utilization of the administrative procedures contractually bargained for was required: *United States v. Grace & Sons*, 384 U. S. 424, 428 (1966). When the issue raised by petitioner's complaint below came to Court, the judicial proceeding under the Wunderlich Act, 41 U.S.C. 321, 322, was concerned only with the issue whether the final administrative decision was arbitrary, capricious, fraudulent, grossly erroneous, not supported by substantial evidence, or erroneous in law. Petitioner could not aver any of these things until the ASBCA decision had actually been rendered and it had to await the ASBCA determination before it could attack it. Petitioner could not fulfill the requirements of the Wunderlich Act for seeking relief if it brought suit before the ASBCA had acted. It could not even claim that it had suffered damages since the ASBCA might give it full recompense by its decision and that could not be determined until the decision was rendered. Until it had a right to demand payment, its claim had not accrued. Its right of action *first accrued* under 28 U.S.C. 2401(a) when it had the right to demand payment and not before: *Nager Elec. Co. v. United States*, supra, slip op. 14-16.

In *Nager Elec. Co. v. United States*, supra, slip op. 19-23, Judge Davis advanced very cogent reasons for *States Marine* and *Northern Metal* being authority only for actions under the Suits in Admiralty Act and not for actions under the Tucker Act, such as the present one, and he concluded, slip op. 23:

> "For these reasons, we think that *States Marine* and *Northern Metal*, dealing as they do with the Suits in Admiralty Act and apparently a different type of claim, are distinguishable from suits like the present and the related cases under the Tucker Act. We do not believe the principle of those opinions should be extended to our class of case which is largely governed by a separate history and different considerations."

It is submitted that *Nager Elec. Co. v. United States*, supra, is declarative of the law on this issue, and that the Court should conclude that the statute of limitations did not commence to run against petitioner until the ASBCA decision was issued on February 28, 1963.

It is submitted that the mandatory administrative proceeding under the "Disputes" clause extended the statute of limitations to the date of final determination thereunder. It next remains to determine whether a "protective suit" was required.

3. *A Protective Suit to Stay the Running of the Statutory Limitations Period Was Not Required.*

Judge Waterman said (R. 26):

> ". . . if a claimant is uncertain whether he should proceed at once with a Tucker Act suit or first submit a dispute, pursuant to his agreement, to the ASBCA, he may always protect himself by instituting a 'protective suit' within the six-year period permitted by the Tucker Act, staying its progress until after a final administrative decision, and then bringing it forward if the administrative decision is adverse to him."

Judge Anderson in his dissent said (R. 31):

> "I do not believe that the contractor's ability to bring a protective suit is a satisfactory solution to the problem. Such a procedure would inevitably lead to the defeat of many legitimate claims in the cases of claimants who are unaware of the need for bringing such protective actions. Furthermore, it would have the unfortunate effect of increasing the burden of the district courts by causing still more crowding of already crowded dockets with lawsuits which will languish for years during the pendency of administrative proceedings, and which in all probability will never come up for trial. Therefore, as a matter of sound judicial administration the requirement that a protective suit be commenced within the period of limitations has little to commend it."

In *Northern Metal Co. v. United States*, supra, 350 F. 2d at p. 839, Judge Freedman, writing for the 3rd circuit, said:

> "We do not believe it would be in accord with the congressional purpose to require the bringing of a 'protective' libel in cases such as this. The dockets of the courts are too crowded for Congress to have intended that suits must be brought while the governmental tribunal is engaged in ascertaining the facts which will determine whether the Government will pay the claim."

Judge Davis writing for the Court of Claims in *Nager Elec. Co. v. United States*, supra, said, slip op. 17:

> ". . . It is suggested that, if suit had to be filed while administrative proceedings were still pending, this court could and would undertake to supervise the course of those proceedings, but we cannot see that the court would properly take any such steps which the Government could not, more easily, take for itself. And on the defendant's view there would be many more cases lying limply on our docket, awaiting administrative determination, which we could neither process further nor effectively call to life."

It is submitted that the proper view is that a "protective suit" was not required of petitioner, and the Court is respectfully requested to so rule.

Conclusion

For the foregoing reasons, we respectfully submit that the decision below, that the suit was time-barred by the statute of limitations, should be reversed.

EDWIN J. MCDERMOTT,
Attorney for Petitioner

INDEX

CITATIONS

Cases:

Cases—Continued

Statutes—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 371

CROWN COAT FRONT CO., INC., PETITIONER

v.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 14) is reported at 363 F. 2d 407. The opinion of the district court (R. 7) is not reported.

JURISDICTION

The judgment of the court of appeals (R. 33) was entered on June 22, 1966. The petition for a writ of certiorari was filed on July 20, 1965, and granted on October 10, 1966 (R. 34). This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

In 1956, petitioner completed performance of a government contract containing a standard disputes

clause. In 1961, petitioner (for the first time) filed a claim under the clause with the contracting officer. In 1963—five months after final administrative denial of his claim but more than six years after contractual performance had been completed—petitioner brought this action for damages against the United States under the Tucker Act. The ultimate question presented is whether its suit was barred by the six-year statute of limitations applicable to such actions. This in turn depends on whether (1) the cause of action accrued at the time of the alleged breach of contract or at the time of the final administrative decision denying petitioner's claim under the disputes clause, and (2), if the former, whether the statute of limitations was tolled during the pendency of the proceedings under that clause.

STATUTES AND CONTRACTUAL PROVISION INVOLVED

28 U.S.C. 2401(a), provides:

> (a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

The Wunderlich Act (Act of May 11, 1954, 68 Stat. 81) provides:

> Section 1 [41 U.S.C. 321]:
>
> No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute in-

volving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent [sic] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

Section 2 [41 U.S.C. 322]:

No Government contract shall contain a provision making final on a question of law the decision of any administrative official representative, or board.

The standard disputes clause contained in the contract between petitioner and the government provides (R. 17):

Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith, be final and conclu-

sive; provided that, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

STATEMENT

On May 14, 1956, petitioner entered into a contract with the United States to manufacture and deliver 89,786 canteen covers of mildew-resistant felt for a total price of $60,691.76 (R. 16). The contract required petitioner to submit sample covers to the government for testing and inspection, and entitled the government to either reject those not meeting contract specifications or require their correction (R. 16). Under the contract's standard disputes clause (R. 17), the parties agreed that "any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer," and that an appeal from his decision could be taken to the Secretary of the Army or his duly authorized representative.

In accordance with the contract, petitioner submitted four lots of samples for testing and inspection (R. 17). After performing laboratory tests in October and November 1956, the government rejected the samples on the ground that they did not contain the quantities of various mildew inhibitors required by the

contract (R. 8, 17). Petitioner then requested the government to accept delivery of the non-conforming covers in consideration of a price reduction of one-half cent per cover, or a total of $270.01. The contract was modified to reflect the reduction, and final delivery of the covers was made on December 14, 1956 (R. 17).

On October 4, 1961, petitioner wrote to the contracting officer claiming, for the first time, that the government had employed improper methods in testing the samples, and demanding a refund of the $270.01 price adjustment plus an equitable adjustment for increased costs occasioned, it was alleged, by delay resulting from the government's rejection of the samples (R. 17–18). On February 21, 1962, the contracting officer denied the claim, finding that the government had employed a proper method of testing and that petitioner was not entitled to an increase in the contract price (R. 9). Petitioner appealed to the Armed Services Board of Contract Appeals. On February 28, 1963, the Board affirmed the contracting officer's decision (R. 18).

On July 31, 1963—five months after the Board's decision, but six years and seven months after petitioner had completed performance of the contract—petitioner brought suit in the district court under the Tucker Act (28 U.S.C. 1346(a)(2)), asking a refund of the $270.01 price adjustment plus a sum "not exceeding $10,000 as the court may deem just and equitable" as compensation for the alleged extra production costs (R. 18). On the basis of the decision of the court of appeals for the circuit in 1960 in *States Marine Corp. of Delaware* v. *United States*,

283 F. 2d 776 (C.A. 2), the district court held the complaint barred by the six-year limitations provision of the Tucker Act (28 U.S.C. 2401(a)), and granted the government's motion for summary judgment (R. 7).

The court of appeals affirmed *en banc* by a five-to-four vote. All of the judges agreed that petitioner's cause of action accrued, at the latest, on the date of the completion of contractual performance (1956), rather than at the time of final administrative denial of petitioner's claim (1963) (R. 19, 28).[1] Judge Waterman, joined by Chief Judge Lumbard and Judges Moore and Smith, adhered to the holding of *States Marine* that the running of the limitations period was not tolled while the contract procedures for the settlement of disputes were being pursued (R. 14–26). Judge Friendly, concurring, stated that he joined in this result because

[1] At the time, there was no conflict of decisions on this point. See *Northern Metal Co.* v. *United States*, 350 F. 2d 833, 836 (C.A. 3). Recently, however, the Court of Claims, in construing a similar statute of limitations (28 U.S.C. 2501), has held that if the contractor's claim is one required to be processed under the disputes clause, "the judicial claim does not ripen so as to trigger limitations until the duly-invoked decision of the administrative or arbitral board or tribunal (if that determination post-dates completion-and-acceptance)." *Nager Electric Co.* v. *United States*, Ct. Cl. No. 348–64, decided October 14, 1966, slip opinion, p. 8. *Nager* was followed by the Court of Claims in three decisions entered the same day. *Conn* v. *United States*, 366 F. 2d 1019; *United Contractors* v. *United States* (No. 42–63); *United States Steel Corp.* v. *United States*, 367 F. 2d 399. The government has filed motions for rehearing and reconsideration by the Court of Claims in the four cases, and has requested it to delay ruling on the motions until this Court has decided the present case.

of the precedent of *States Marine*, but that, were the issue "arising in this court for the first time, I might well be persuaded to the position taken" by the Third Circuit in the intervening decision of *Northern Metal Co.* v. *United States*, 350 F. 2d 833, which held that the statute of limitations was tolled (R. 27). Judge Anderson, joined by Judges Kaufman, Hays, and Feinberg, dissented, urging that *States Marine* be overruled and *Northern Metal* followed (R. 27).

SUMMARY OF ARGUMENT

The ultimate question in this case is whether, as the court of appeals held, petitioner's Tucker Act suit against the government was time-barred because filed more than six years after performance of the contract out of which petitioner's claim arose. Petitioner challenges the decision below on two alternative grounds. The first is that its cause of action did not arise until its administrative claim for relief under the standard disputes clause in the contract was denied by the Armed Services Board of Contract Appeals, and hence that the statute of limitations did not begin to run until that time. The second is that, even if the cause of action accrued earlier—when the contract was completed—the statute of limitations was tolled while the administrative proceedings under the disputes clause were in progress. We submit that the court of appeals properly rejected both contentions.

I

Petitioner's cause of action "first accrued", at the latest, when performance under the contract was com-

pleted; for the action was one upon the contract. That the contracting parties had agreed in the disputes clause to submit factual questions relating to any dispute initially to a form of arbitration did not change the character of the cause of action or postpone its accrual. *Unexcelled Chemical Corp.* v. *United States,* 345 U.S. 59; *McMahon* v. *United States,* 342 U.S. 25. The Tucker Act suit involved alleged wrongful conduct by the government during contractual performance—not a wrongful refusal to grant administrative relief under the disputes clause.

The novel position urged by petitioner would have serious practical consequences. Since the disputes clause specifies no time limitation for filing the administrative claim, contractors would not be subject to any effective period of limitations. At least with respect to many existing contracts, the government would have no protection against having to defend against stale claims. Congress cannot have intended this result. See *McMahon, supra,* 342 U.S. at 27.

II

If, as we urge, the cause of action accrued no later than completion of contractual performance, petitioner's action should be held untimely. Under settled principles, a tolling provision will not be read into a statute of limitations governing suits against the United States; Congress' waiver of sovereign immunity from suit is to be strictly observed in this as in other respects. *E.g., Soriano* v. *United States,* 352 U.S. 270. In the present context, application of this precept achieves a sound and workable accommo-

dation of the interests of the government and the contractor. Strict enforcement of the six-year limitation encourages prompt submission and diligent prosecution of the administrative claim under the disputes clause. At the same time, in those rare cases where the administrative proceeding cannot be completed within six years of the completion of the contract, the contractor can safeguard his rights by filing a protective action—a simple and familiar procedure which stops the running of the limitations period.

ARGUMENT

I. PETITIONER'S CAUSE OF ACTION ACCRUED, AT THE LATEST, WHEN PERFORMANCE OF THE CONTRACT WAS COMPLETED

Petitioner argues that its cause of action against the government in this suit, though based on the contract, accrued when its claim under the disputes clause was finally rejected by the Army. If so, the suit, commenced within five months of that final rejection, was not time-barred. All concede that, but for the disputes clause and the proceedings thereunder, the cause of action accrued no later than the completion of contractual performance—more than six years before the suit was brought—since by that date all events necessary to perfect the cause of action had occurred. See, *e.g.*, *Israel* v. *Baker*, 172 F. 2d 63 (C.A. 10); *City of Albany* v. *Leftwich*, 24 F. 2d 297 (C.A. 5), certiorari denied, 277 U.S. 599.[3] The issue

[3] Whether the cause of action may have accrued at an even earlier time—such as the date on which the government rejected the sample covers—is not an issue here; this suit was filed more than six years after any such date.

on this branch of the case is thus whether the disputes clause operated to postpone the date on which the cause of action "first accrue[d]" (28 U.S.C. 2401(a)). We think not.

A. UNDER SETTLED PRINCIPLES, THE PROVISION OF AN ADMINISTRATIVE REMEDY DOES NOT AFFECT THE ACCRUAL OF A JUDICIAL RIGHT TO REDRESS

The disputes clause is no more than an undertaking by the parties to submit all disputes concerning questions of fact arising under the contract to a type of limited arbitration, as a prerequisite to obtaining judicial relief. This voluntary[5] undertaking to defer seeking judicial redress plainly does not affect the character of the cause of action or postpone its accrual; the claim is still one for breach of contract.[6] If the canteen covers in fact met contract specifications, so that the government improperly refused to take delivery of them, petitioner's cause of action arose no later than the date of petitioner's completion of the

[5] In *United States* v. *Wunderlich*, 342 U.S. 98, 100, this Court noted the consensual nature of the disputes clause, stating:

"Respondents were not compelled or coerced into making the contract. It was a voluntary undertaking on their part. As competent parties they have contracted for the settlement of disputes in an arbital manner. This, as we have said in *Moorman* [*United States* v. *Moorman*, 338 U.S. 457] Congress left them free to do. * * *"

[6] In a suit for breach of contract, demand upon the defendant is frequently a prerequisite to suit; but it does not postpone accrual of the cause of action. An example would be a suit upon a note. If a note is due and payable on, say, December 31, 1956, the cause of action for failure to pay the sum due accrues on that date—not on the later date when the plaintiff makes a formal demand upon the defendant and the demand is rejected.

work of the contract (December 14, 1956). For by that time all the elements necessary to establish the breach, and entitlement to damages therefor, had come into existence—the testing of the samples, their rejection, the delays and increased costs incurred thereby, and the right to payment under the contract.

The Wunderlich Act, 68 Stat. 81, 41 U.S.C. 321–322 (*supra*, pp. 2–3), did not transform the contractor's cause of action into a right to challenge the administrative determination under the disputes clause.[5] The Act does not change the voluntary character of the clause; nor does it create any new right of action (see pp. 26–27, *infra*). So far as relevant here, it merely provides that in a suit on the contract the administrative determination may be disregarded if found to be arbitrary or unsupported by substantial evidence. The Act thus creates—for government contracts containing disputes clauses—a remedial procedure akin to that created by the doctrine of primary jurisdiction in cases where a claim that may be filed in court raises issues within the special competence of an ad-

[5] Many of the decisions delineating the standards of the Wunderlich Act have involved suits by the government on claims against the contractor, where the facts underlying the claim had been found in the government's favor in the administrative proceedings under the disputes clause. *E.g.*, *United States* v. *Hammer Contracting Corporation*, 331 F. 2d 173 (C.A. 2); *United States* v. *Taylor*, 333 F. 2d 633, 336 F. 2d 149 (C.A. 5); *Silverman Brothers* v. *United States*, 324 F. 2d 287 (C.A. 1); *United States* v. *Hamden Co-operative Creamery*, 297 F. 2d 180 (C.A. 2). All of these were actions on the contract. It has never been suggested that they were suits to enforce the administrative determination under the disputes clause.

ministrative agency.[5] A complaint is filed in the court initially;[6] but "the judicial process is suspended pending referral of such issues to the administrative body for its views." *United States* v. *Western Pac. R. Co.*, 352 U.S. 59, 63–64; see, also, *Thompson* v. *Texas Mexican Ry.*, 328 U.S. 134; *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422, 433. After the agency has made its determination, the judicial action resumes. The administrative determination—though reviewable in the judicial proceeding (see 28 U.S.C. 1398(b)—does not create a new cause of action or extinguish the original cause from which the suit arose. It follows that the statute of limitations runs from the original filing of the complaint. So this Court has held in contexts not essentially different from that at bar.

The Walsh-Healy Act, 41 U.S.C. 35 *et seq.*, empowers the United States to recover liquidated damages from contractors who knowingly employ child labor. The Secretary of Labor is authorized and directed to conduct investigations, to hold hearings and to "make findings of fact after notice of hearing," with respect to violations of the Act, and his findings (if supported by a preponderance of the

[5] The analogy of the judicial function in disputes-clause cases to that in the primary-jurisdiction area has previously been drawn by this Court. *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 717–713; *United States* v. *Grace & Sons*, 384 U.S. 424, 428.

[6] It is not suggested that the court would lack jurisdiction of the contractor's Tucker Act suit prior to completion of disputes-clause proceedings. See *Stein Brothers* v. *United States*, 337 F. 2d 861, 862–863, and *W.P.C. Enterprises* v. *United States*, 323 F. 2d 874, (both disapproved on other grounds in *United States* v. *Grace & Sons*, 384 U.S. 424, 430–431).

evidence) are conclusive in any judicial proceeding to enforce the Act (41 U.S.C. 38–39). In *Unexcelled Chemical Corp.* v. *United States,* 345 U.S. 59, the Secretary, in 1947, issued a complaint charging violations by Unexcelled during the years 1942–1945; the Secretary, in 1949, had made a final determination that Unexcelled was liable; and, less than a year later, the government had sued for damages. In response to the contractor's argument that suit was barred by the two-year statute of limitations of the Portal-to-Portal Act (29 U.S.C. 255), the government urged that the limitations period began to run only after the Secretary of Labor administratively determined that the contractor had violated the Act and was liable for liquidated damages. Holding the suit time-barred, this Court stated (345 U.S. at 65–66):

> We conclude that "the cause of action accrued," within the meaning of § 6 of the Portal-to-Portal Act, when the minors were employed. That was the violation of the Walsh-Healey Act, giving rise to the liability for liquidated damages. * * * The fact that due deference to the administrative process should make a court hold its hand until the administrative proceedings before the Secretary of Labor have been completed (*Far East Conference* v. *United States,* 342 U.S. 570; *Thompson* v. *Texas Mexican R. Co.,* 328 U.S. 134; *General American Tank Corp.* v. *El Dorado Terminal Co.,* 308 U.S. 422; *United States* v. *Morgan,* 307 U.S. 183) is a matter of judicial administration and of no relevancy here. The statutory liability accrued when the minors were em-

ployed. It was from that date that the period of limitations began to run.

Similarly, in the present case the cause of action arose when the alleged violation of the contractual duty occurred. That—and not the administrative decision on the matter—is the event that gives rise to the contractor's right to a recovery from the government. The contractual liability, if any, accrued at that time, and "[i]t was from that date that the period of limitations began to run." 345 U.S. at 66. We stress that this is not a case where the gist of the complaint is the government's failure to honor a claim. An action for a statutory refund arises only after there has been a demand by the plaintiff and a refusal of that demand that may be characterized as a breach of duty (*e.g., United States* v. *Taylor,* 104 U.S. 216, 221–222); a disbursing officer's action for relief from liability for lost funds arises only after accounting officers have refused to credit his accounts with the amount in dispute (*e.g., United States* v. *Smith,* 105 U.S. 620; *United States* v. *Clark,* 96 U.S. 37, 43–44). Compare p. 10, n. 4, *supra.* In such cases until administrative action is taken there is no breach of duty by government officials and, consequently, no basis for a damages claim. The present case is different. If the government had a duty to pay petitioner the amounts it claims, that duty arose no later than the date of its final delivery of the canteen covers.

The Court of Claims—in recently adopting the view, urged by petitioner here, that the cause of action does not accrue until final administrative action under the

disputes clause [8]—sought to distinguish *Unexcelled* on the ground that there the administrative procedure was "non-mandatory" and the claimant "could bring suit, if it wished, without following the administrative route" (*Nager Electric Co.* v. *United States*, Ct. Cl. No. 348–64, decided October 14, 1966, slip opinion, p. 14). But the Walsh-Healey Act clearly contemplates that adjudicatory hearings are to be held and the essential findings made by the Secretary of Labor, not the court (see pp. 12–13, *supra*; cf. *United States* v. *Winegar*, 254 F. 2d 693 (C.A. 10)),[9] and the Court in its opinion in *Unexcelled* nowhere suggested that the administrative procedure was merely permissive—or that permissiveness was a relevant factor.

Indeed, the Court had earlier held that an administrative remedy that was plainly mandatory nevertheless did not postpone the accrual of the underlying cause of action. In *McMahon* v. *United States*, 342 U.S. 25, a seaman who claimed he was injured aboard

[8] The court described this as the "uniform course of [its] practice" (*Nager Electric Co.* v. *United States*, Ct. Cl. No. 348–64, decided October 14, 1966, slip opinion, p. 7). However, only two of the decisions that it cites for this proposition (*id.* at p. 6, n. 11) involve the disputes clause and in both the statement was merely *dictum*. *Cosmopolitan Mfg. Co.* v. *United States*, 156 Ct. Cl. 142, 297 F. 2d 546, certiorari denied *sub nom. Arlene Coats* v. *United States*, 371 U.S. 818; *Electric Boat Co.* v. *United States*, 81 Ct. Cl. 361, certiorari denied, 297 U.S. 710. And there is language from that court which looks the other way (see pp. 18–19, *infra*).

[9] Thus, under both Walsh-Healey Act and under the Tucker Act where a disputes clause is involved, the judicial action can be brought before completion of the administrative proceedings; the court defers judicial action pending the administrative decision. See *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 717–718; *United States* v. *Winegar*, *supra*.

a government vessel filed suit more than two years after the injury occurred. Under the Clarification Act (57 Stat. 45, 50 U.S.C. App. 1291(a)), claims such as his could be enforced pursuant to the Suits in Admiralty Act (41 Stat. 525, 46 U.S.C. 741 *et seq.*) "if administratively disallowed in whole or in part". The latter Act in turn required that any suit thereunder "may be brought only within two years after the cause of action arises." 46 U.S.C. 745. The seaman argued that his cause of action could not arise until after his claim was "administratively disallowed," and therefore that his suit—commenced within two years after administrative disallowance of the underlying claim—was timely. This Court rejected the argument, holding that the action accrued at the time of the injury and that the limitations period began to run then. The Court reasoned that the limitation "depended upon the event giving rise to the claims, not upon the rejection" (342 U.S. at 27).

The Court of Claims in *Nager* thought *McMahon* distinguishable in the present context because of the following language in the Court's opinion (342 U.S. at 27):

> [W]e think it clear that the proper construction of the language used in the Suits in Admiralty Act is that the period of limitation is to be computed from the date of the injury. It was enacted several years before suits such as the present, on disallowed claims, were authorized. Certainly during those years the limitation depended upon the event giving rise to the claims, not upon the rejection. When later the right to sue was broadened to include such

> claims as this, there was no indication of any change in the limitation contained in the older Act. * * *

But this language describes precisely the situation with respect to dispute clauses. Before such clauses were commonly included in government contracts, the general rule in Tucker Act cases—as the Court of Claims itself in its *Nager* opinion (slip opinion, p. 4) pointed out—was that "normally the cause of action first accrues, and the statute begins to run, when the work is completed or the items delivered (and accepted), or the services rendered, or (if the contract was never completed) when the breach became total."[10] Accordingly, in that era (as in the years before enactment of the Clarification Act), the claim clearly accrued upon the occurrence of the breach or other event giving rise to the claim—not upon any administrative action on the claim. If the Clarification Act—which expressly confined suit to claims "administratively disallowed"—would not be read by this Court in *McMahon* as evincing a congressional intent to delay the accrual of the cause of action until administrative action was completed, *a fortiori* an agreement between the parties to have their disputes considered administratively does not postpone accrual.[11]

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[10] In support of this statement the court cited, *inter alia*, *Battelle* v. *United States*, 7 Ct. Cl. 297, 300; *Patterson* v. *United States*, 21 Ct. Cl. 322, 323; and *Carlisle* v. *United States*, 29 Ct. Cl. 414, 415.

[11] The Court of Claims also attempted to distinguish *McMahon* on the ground that the contractor, unlike the seaman in *McMahon*, does not have the power to determine when the period of limitations begins to run. We show, immediately below that the

B. THE RECENT RULING OF THE COURT OF CLAIMS—UNDER WHICH THE STATUTE OF LIMITATIONS DOES NOT BEGIN TO RUN UNTIL FINAL ADMINISTRATIVE DECISION UNDER THE DISPUTES CLAUSE—IS CONDUCIVE TO UNDUE DELAY IN THE DISPOSITION OF CONTRACT CLAIMS AGAINST THE GOVERNMENT

There is, we believe, a compelling practical reason to reject the view that the contractor's cause of action does not accrue until after the disputes clause procedure is exhausted. The contract fixes no time within which the contractor must present his claim to the contracting officer. He has, therefore, the exclusive power to decide when the disputes machinery will be invoked on any particular claim. Under petitioner's theory, the contractor could postpone the commencement of limitations indefinitely, thereby completely frustrating the congressional purpose in setting a six-year limitation. As the Court of Claims aptly observed in *Aktiebolaget Bofors* v. *United States*, 139 Ct. Cl. 642, 644, 153 F. Supp. 397, 399 (a case involving a simple arbitration provision in a government contract):

> The Government says that the running of the statute of limitations was not affected by the arbitration provision. We think the Government is right. The arbitration agreement is a provision for extrajudicial resolution of disputes, analogous to administrative remedies which are often available. A party may be barred from suit for failure to exhaust such remedies, but normally, the statute of limita-

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contractor does have the power to a large extent if the view of the Court of Claims is accepted.

A statute enacted by Congress only this year lends added support to the view that accrual of the contractor's cause of action is not affected by final agency decision under the disputes clause. Public Law 89–505, 80 Stat. 304, discussed *infra*, pp. 28–30.

> tions runs while he is pursuing them. *In the case of arbitration agreements, with no time limit, it would be intolerable that a party should prevent the statute of limitations from even beginning to run, merely by delaying his request for arbitration.* [Emphasis added.]

See, also, *McMahon* v. *United States, supra,* 342 U.S. at 27, where this Court pointed out:

> Since no time is fixed within which the seaman is obliged to present his claim, under petitioner's position he would have it in his power, by delaying its filing, to postpone indefinitely commencement of the running of the statute of limitations and thus to delay indefinitely knowledge by the Government that a claim existed. We cannot construe the Act as giving claimants an option as to when they will choose to start the period of limitation of an action against the United States. * * *

In its recent *Nager* opinion, the Court of Claims suggested that the contractor is not free to present his claim whenever he desires, because various substantive clauses of the contract that govern equitable adjustments or comparable relief "usually have built-in-time limits, and where no specific period is established in the contract the contractor cannot delay unreasonably" (slip opinion, p. 23). While such time limits may in some circumstances prevent the contractor from enjoying unlimited discretion as to when to commence administrative proceedings, their effectiveness is limited. To begin with, many substantive clauses in current contracts specify no time limi-

tation at all.[12] Others have a time limit contingent on the happening of an event, or are otherwise highly indefinite. In addition, we point out that the Court of Claims has regularly declined to construe even time limitations absolute in terms as strictly barring tardy claims. See, *e.g.*, *Farnsworth & Chambers Co.* v. *United States*, 346 F. 2d 557; *H. L. Yoh Co.* v. *United States*, 153 Ct. Cl. 104, 288 F. 2d 493; *Vinegar Hill Zinc Co.* v. *United States*, 149 Ct. Cl. 494, 276 F. 2d 13; *Shepherd* v. *United States*, 125 Ct. Cl. 724, 113 F. Supp. 648. And such limitations would of course have no effect on "breach" claims joined with disputes-clause claims under the same contract. *United States* v. *Utah Construction Co.*, 384 U.S. 394.[13]

Thus, while the government could amend its procurement regulations to fix a definite time limit upon the presentation of any claim arising under the disputes clause to the contracting officer, such a limit would—the decisions of the Court of Claims so indicate—be difficult to enforce, and at all events far less definite and effective than the six-year statute of limitations in the Tucker Act. And to the extent it was enforced a fixed limit would eliminate the flexibility that administrative officers now have to consider and pay claims they believe to be meritorious. Nor would any change in the existing regulations affect the hundreds of millions—perhaps billions—of dollars of

[12] See, for example, the suspension of work clauses considered in *Jefferson Construction Co.* v. *United States*, Ct. Cl. No. 218-64, decided November 10, 1966; and *T. C. Bateson Construction Co.* v. *United States*, 162 Ct. Cl. 145, 147, 319 F. 2d 135, 136.

[13] See, further, p. 32, *infra*.

public contracts now outstanding. Thus, to hold that a claim under the disputes clause does not arise until final administrative determination could remove all effective time limitations upon countless contract actions. We point to the facts of *United States Steel Corp.* v. *United States* (367 F. 2d 399 (Ct. Cl.)), decided the same day as *Nager*. The contract was entered into in 1943 and completed in 1944 or 1945. In March, 1946, the contractor appealed a decision of the contracting officer to the Board of Contract Appeals, but the final administrative decision was not rendered until October 30, 1958.[14] Suit was filed in the Court of Claims on March 19, 1962. Under the Court of Claims' view, not only was this suit timely as to matters properly presented to and considered by the agency; the contractor was—as mentioned—also free to raise for the first time, some seventeen or eighteen years after the contract was completed, any breach claims it might have with respect to the contract, ~~claims~~, albeit such claims need not be submitted for administrative consideration. The difficulties inherent in defending against claims of that kind at so late a date need no elaboration.

In short, within very broad limits the contractor would, under the view of the Court of Claims, be free to choose when to commence the running of the period of limitations. This Court has ruled—in regard to a much shorter (two-year) statute of limitations—that "[w]e cannot construe the Act as giving

[14] Apparently the plaintiff did not prosecute its administrative claim diligently, and the matter lay dormant on the Board's docket for more than ten years (see 367 F. 2d 399, 405).

claimants an option as to when they will choose to start the period of limitation of an action against the United States." *McMahon, supra,* 342 U.S. at 27. Surely, no different result should follow here.

II. THE RUNNING OF THE STATUTE OF LIMITATIONS IN A CONTRACT ACTION AGAINST THE UNITED STATES IS NOT TOLLED BY THE ADMINISTRATIVE PROCEEDINGS REQUIRED BY THE STANDARD DISPUTES CLAUSE

If the Court agrees with our preceding point—that petitioner's cause of action accrued at the latest when contractual performance was completed, and that the statute of limitations thus began to run at that time—it must next consider whether the statue was tolled while the administrative proceedings under the disputes clause were in progress. If so, the suit is timely, since the period between the completion of contractual performance and the filing of the complaint in the district court, minus the period consumed in the administrative proceedings, was less than six years.

We believe that such a tolling provision cannot properly be engrafted upon the Tucker Act's statute of limitations. That statute provides that "[e]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. 2401(a) (*supra,* p. 2). Only if the plaintiff is overseas or under legal disability at the time the cause of action first accrued may he—under the express terms of Section 2401(a)—bring suit beyond the six-year period ("within three years after the disability ceases"). Under settled principles, further exceptions may not be implied in a statute limiting the time within which to sue the United States.

A. TIME LIMITATIONS IN STATUTES AUTHORIZING SUIT AGAINST THE UNITED STATES MAY NOT BE WAIVED OR TOLLED EXCEPT AS SPECIFICALLY PROVIDED BY CONGRESS

In a private action, the statute of limitations is merely a defense; like other defenses, it may be waived. And courts have frequently given liberal interpretations to statutes of limitations in order to mitigate the severity of holding a suit that may be meritorious time-barred. At the same time, the unique character of statutes of limitations governing suits against the United States has been repeatedly affirmed. In such a suit, the statute of limitations defines a condition upon the Legislature's waiver of the government's sovereign immunity from suit; it is jurisdictional; and, like other conditions upon that waiver, it must be strictly observed. Thus, in the absence of express congressional authority, government officers cannot waive the statute of limitations. *Munro* v. *United States,* 303 U.S. 37; *United States* v. *Michel,* 282 U.S. 656. As this Court explained in *Finn* v. *United States,* 123 U.S. 227, 232–233:

> The general rule that limitation does not operate by its own force as a bar, but is a defence, and that the party making such a defence must plead the statute if he wishes the benefit of its provisions, has no application to suits in the Court of Claims against the United States. An individual may waive such a defence, either expressly or by failing to plead the statute; *but the Government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the Court of Claims.* Since the Government is not

liable to be sued, as of right, by any claimant, and since it has assented to a judgment being rendered against it only in certain classes of cases, brought within a prescribed period after the cause of action accrued, a judgment in the Court of Claims for the amount of a claim which the record or evidence shows to be barred by the statute, would be erroneous. [Emphasis added.] [15]

More recent authority may be found in *Soriano* v. *United States*, 352 U.S. 270. Petitioner in that case, a resident of the Philippines, filed suit to recover just compensation for the requisitioning by Philippine guerrilla forces of foodstuffs and supplies from 1942 through January 1945, during the Japanese occupation of the Islands. His claim was filed with the United States Army Claims Service on March 30, 1948, and denied on June 21, 1948. He brought suit in the Court of Claims under the Tucker Act on April 26, 1951. Petitioner urged that the suit was timely because he was required to present his claim to the Army Claims Service before he could sue in court, and in any event because the war prevented his making the claim in time.

This Court rejected both arguments. It held that, since Congress had not made the exhaustion of administrative remedies a prerequisite to invoking the jurisdiction of the Court of Claims, to hold the statute tolled pending exhaustion "would but 'engraft * * * [another] disability upon the statute' and thus frus-

[15] In *United States* v. *Greathouse*, 166 U.S. 601, 606, the Court stated: "We may add that it was not contemplated that the limitation upon suits against the Government in the District and Circuit Courts of the United States should be different from that applicable to like suits in the Court of Claims."

trate the purpose of Congress." 352 U.S. at 275. Neither would the Court hold the running of the statute tolled by war, stating (*id.* at 275–276):

> To permit the application of the doctrine urged by petitioner would impose the tolling of the statute in every time-limit-consent Act passed by the Congress. For example, statutes permitting suits for tax refunds, tort actions, alien property litigation, patent cases, and other claims against the Government would be affected. Strangely enough, Congress would be required to provide expressly in each statute that the period of limitation was not to be extended by war. But Congress was entitled to assume that the limitation period it prescribed meant just that period and no more. With this intent in mind, Congress has passed specific legislation each time it has seen fit to toll such statutes of limitations because of war. And this Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied. *United States* v. *Sherwood*, 312 U.S. 584, 590–591 (1941), and cases there cited. * * *

Glus v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, and *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, relied on by the dissenting judges below, are actually in harmony with the *Soriano* principle. In both cases, to be sure, this Court held that the statute of limitations had been waived. But both were suits against a private employer under the Federal Employers Liability Act—not claims against the government. As we have seen, the distinction is

fundamental. In *Soriano* the Court rejected as precedent a decision involving the construction of a statute of limitations applicable to private litigation, remarking: "That case involved private citizens, not the Government. It has no applicability to claims against the sovereign." 352 U.S. at 275.

B. CONGRESS HAS NOT AUTHORIZED THE TOLLING OF THE TUCKER ACT'S STATUTE OF LIMITATIONS IN THE PRESENT CIRCUMSTANCES

No Act of Congress provides for the tolling of the Tucker Act's statute of limitations during the pendency of administrative proceedings under the standard disputes clause in government contracts; nor does any provision of law authorize government contracting officers to extend the statutory six-year period. This alone requires rejection of petitioner's claim that the statute of limitations was tolled here. But we also point out that there are affirmative indications that Congress did not intend the statute to be tolled in the present circumstances, and that sound reasons of policy support the result we urge.

1. In the Wunderlich Act Congress dealt explicitly with the administrative proceedings under the disputes clause, and assured limited judicial review of such proceedings in the contractor's Tucker Act suit (p. 11, *supra*). But Congress did not provide that the statute of limitations would be tolled during those proceedings. On the contrary, the House Report (H. Rep. No. 1380, 83d Cong., 2d Sess., p. 6) states:

> The committee forsees no possibility of the proposed legislation creating any new rights that a contractor may not have had prior to

its enactment, with the exception of the standards of review therein prescribed. Under the terms of the standard disputes clause the decision of a contracting officer is final unless the contractor appeals within 30 days. The Supreme Court in *United States* v. *Holpuch Co.* (328 U.S. 234), has held that unless a contractor pursues the administrative remedy of appeal to the head of the department which he is granted by the disputes clause, he loses his right to sue in the Court of Claims. Government contractors who have not appealed their decisions to the head of the department within the 30-day period will not be permitted to do so.

The statute of limitations regarding claims against the United States is jurisdictional and *prevents the consideration of a claim which is more than 6 years old.* Claims less than 6 years old, and *not heretofore filed in the courts may,* if filed, receive the protection of the proposed legislation. In this way the basic requirement of the 30 days, as well as the protection which the Government receives under the statute of limitations applicable to these matters, have been retained. [Emphasis added.]

This language, we believe, negates any possible inference that Congress meant the statutory six-year period to be enlarged by the filing of the administrative complaint under the disputes clause. On the contrary, Congress clearly believed that the Tucker Act's statute of limitations was jurisdictional and that the controlling factor in determining the timeliness of a claim was not the administrative filing, but the filing of the

claim "in the courts" within six years; and it determined to retain "the protection which the Government receives under the statute of limitations."

Recent legislation confirms the consistent congressional understanding that claims under government contracts containing disputes clauses accrue at the time of the occurrence of the underlying facts, and that the period of limitations is not tolled during the pendency of proceedings under that clause. Public Law 89–505, 80 Stat. 304 (1966), imposes a statute of limitations on suits by the government, providing in pertinent part:

> Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later * * *.

Obviously, if Congress believed that the administrative decision was an essential element of the cause of action, it would not have provided an additional "one year after final decisions * * * in applicable administrative proceedings required by contract" within which to file suit, for the government would have six years after the decision. And Congress' focus was expressly on disputes clauses:

> Subsection (a) of new section 2415 added by the bill provides for a 6-year limitation which would apply to all Government actions based on contracts whether express or implied in law or in fact. This provision would extend to obligations which are based on quasi-contracts. In all such contract matters, the action would be barred unless it were brought by the Government within 6 years after the right of action accrues, or within 1 year after a final decision in a required administrative proceeding, whichever is later. *This last provision, which has the effect of tolling the running of the statute of limitations during mandatory administrative proceedings, is necessary because of the great number and variety of such proceedings made possible by current statutes.* An administrative proceeding ordinarily consumes a considerable period of time and, as has been noted, the bill would permit the Government a year after the final administrative decision in which to present its case for judicial determination. *An example of such an administrative proceeding are those which involve appeals under the "disputes" clause of Government contracts.* [H. Rep. No. 1534, 89th Cong., 2d Sess., p. 4 (emphasis added); to like effect see S. Rep. No. 1328, 89th Cong., 2d Sess., p. 3.]

If, as the Court of Claims believes, the cause of action does not accrue until completion of the administrative proceedings, or if, as the Third Circuit believes, such proceedings automatically toll the period of limitations, no express provision for tolling would have been necessary. If—as Congress believed—an express provision "is necessary" in order

to provide for tolling in suits *by* the government, where no waiver of sovereign immunity is involved, it follows a *a fortiori* that an express provision is necessary to provide for tolling during disputes clause proceedings in suits by the contractor against the government.[16] When Congress has desired to suspend limitations on suits against the United States, it has done so expressly. For example, it has provided that limitations in the Suits in Admiralty Act shall be tolled pending administrative consideration of claims arising out of maritime contracts for war risk insurance (46 U.S.C. 1292). Congress has suspended limitations pending administrative consideration of claims for veterans' insurance (38 U.S.C. 784(b)), and for certain tort claims submitted for administrative settlement (28 U.S.C. 2401(b)). The Internal

[16] We also note that in the new statute, as in others where Congress has provided for a later filing because of contingencies such as disability or administrative proceedings, only a short period—one year—is allowed. Under the Court of Claims' view, the contractor would be allowed six years to sue after completion of the administrative proceedings. In actions for review of administrative decisions generally, suit must be filed within considerably less than a six year period. For example, suit for review of the administrative decision must be brought within sixty days thereof under the Social Security Act, 53 Stat. 1360, as amended, 42 U.S.C. 405(g); the Federal Trade Commission Act, as amended, 15 U.S.C. 45(c); and the Judicial Review Act of 1950, 5 U.S.C. 1034, which governs review of certain decisions of the Federal Communications Commission, the Secretary of Agriculture, the Maritime Commission, the Maritime Administration, and the Atomic Energy Commission. The Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1436, 33 U.S.C. 921(a), allows only thirty days for commencing suit for review of a compensation decision.

Revenue Code expressly authorizes federal officers to extend the period of limitations, pending administrative action on tax claims, by written agreement with the taxpayer (26 U.S.C. 6532(a)(2)). The Tucker Act itself provides for tolling in the case of persons "under a legal disability or beyond the seas at the time the claim accrues"; suits by such persons may be brought within three years after the disability ceases (28 U.S.C. 2401(a), 2501). Having specifically provided for tolling in certain circumstances in many statutes—including the one in issue here—"Congress was entitled to assume that the limitation period it prescribed meant just that period and no more." *Soriano* v. *United States*, 352 U.S. 270, 276.

2. To permit the filing of the administrative claim under the disputes clause to toll the Tucker Act's six-year statute of limitations would have unfortunate practical consequences. The contractor could wait until the six years had almost expired, file his administrative claim, and not until the claim had been denied—no matter how protracted the administrative proceeding—bring suit under the Tucker Act. The contractor would have no incentive either to file the administrative claim promptly or to prosecute it diligently. In addition, the government would be required to defend claims under highly disadvantageous circumstances, due to the lapse of time since the occurrence of the facts on which the claim was based.

It is no answer, as the Third Circuit in *Northern Metal* and the dissenting judges below suggested, that once the administrative claim has been filed the gov-

ernment is on notice of the claim. (That was true in *Soriano* also.) The government might still have grave difficulty in preserving an effective defense. In addition, many claims arising from government contracts are so-called "breach" claims that are not within the scope of the standard disputes clause and hence need not be asserted administratively before a Tucker Act suit is brought. *United States* v. *Utah Construction Co.*, 384 U.S. 394. In many cases both types of claim are involved, and they may involve factually distinct issues. Yet, as the Court of Claims pointed out in its recent *Nager* decision (see pp. 14–15, *supra*), if the period of limitations is tolled during the pendency of administrative proceedings as to claims covered by the disputes clause it should be tolled as to breach claims as well, under "the principle that one indivisible contract normally gives rise only to one cause of action" (slip opinion, p. 25).

Nor can a rule of tolling be defended as necessary to avert hardship to government contractors. In *Soriano* this Court refused to engraft a tolling provision upon those expressly provided by Congress even though, in some cases, war might make it impossible for a claimant to preserve his position. There is no comparable hardship in the present context. In those unusual circumstances where a contractor finds the six-year period of limitations expiring without his having obtained a final agency decision,[17] he is not without a remedy. He can, with

[17] Such circumstances are absent here. Petitioner waited more than four years before asserting his claim administratively. That delay is not explained by the allegation of the

little cost or effort, safeguard his rights completely by filing a protective suit. The judicial proceeding may then be stayed pending final agency decision. *States Marine Corp. of Delaware* v. *United States*, 283 F. 2d 776, 779 (C.A. 2); R. 20. This is a familiar and well recognized procedure.[18] *United States* v. *Winegar*, 254 F. 2d 693 (C.A. 10), illustrates its operation in a related context. The United States had filed suit to recover liquidated damages from a contractor under the Walsh-Healey Act. While administrative proceedings under the Act were still ongoing, the statute of limitations was running. *Unexcelled Chemical Corp.* v. *United States*, 345 U.S. 59 (pp. 13–14, *supra*). The Tenth Circuit held that, instead of dismissing the case, the district court should have retained it on its docket pending completion of the administrative proceedings.

We stress that only in the unusual case will the contractor be required to file a protective action.

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complaint that the United States did not inform petitioner until March 20, 1959, of the method used in testing the samples (R. 1, 2). For there is no allegation that prior to 1959 petitioner had claimed that the samples met the contract specifications, or inquired as to the method used in testing them.

[18] It is similar to that prescribed by this Court in cases where the enforcement of a claim originally cognizable in court "requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *United States* v. *Western Pac. R. Co.*, 352 U.S. 59, 63–64; see, also, *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, 336; *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 220–221; pp. 11–12, *supra*.

Moreover, the relatively small cost which this course involves can almost always be avoided by the prompt submission of claims to the contracting officer and their diligent prosecution before him and the contract appeals boards. The average time between docketing and disposition of cases in the Armed Services Board of Contract Appeals is eleven months. Spector, *Is It "Bianchi's Ghost" Or "Much Ado about Nothing?"* 29 Law and Contemp. Probs. 87, 99 (1964). In this case, for example, the contracting officer decided petitioner's claim less than five months after it was first submitted to him, and the Board's final decision was rendered approximately one year later (R. 17–18). Thus, there would have been no problem of limitations here had petitioner promptly presented its claim to the contracting officer, instead of delaying almost five years before doing so.[19]

Since protective actions are thus bound to be few and infrequent, there is no basis for the concern voiced by the dissenting judges below and the Third Circuit in *Northern Metal*—that such actions are a burden on the federal court system. In addition, it is plain that the problem of crowded court dockets is aggravated by cases that are ready to proceed to trial, and not by cases which are merely held in abeyance by understanding of the court and the parties. Protective actions are easily handled by a stipulation between the contractor and the govern-

[19] Even after waiting for almost five years to file its claim administratively, petitioner was placed fully on notice by the Second Circuit's decision in *States Marine Corp. of Delaware* v. *United States*, 283 F. 2d 776, in 1960, of its right to file a protective action.

ment to stay the matter pending the agency decision; they require minimal judicial attention.

Thus the decision below achieves a sound and practical accommodation between the interests of the government and of the contractor. The government is protected against stale claims; diligent pursuit of the administrative remedy under the disputes clause is encouraged; and the contractor has a simple method of preventing his claim from being time-barred in those very few cases where a final administrative decision cannot be obtained promptly.[20]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 1966.

[20] That Congress approves the use of protective actions is reflected by Section 3 of the Federal Arbitration Act, 9 U.S.C. 3. That statute expressly provides that an action involving any issue referable to arbitration under a written agreement for such arbitration shall be stayed pending completion of the arbitral process.

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Petitioner,

v.

UNITED STATES.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THOMAS KIERNAN AS *AMICUS CURIAE*

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Preliminary Statement

This brief is submitted in the interest of clients who may be affected by the decision in this case. The brief does not discuss the facts of the case before the Court, but is addressed only to the proper interpretation of the six year statute of limitations of the Tucker Act, Act of June 25, 1948, 62 Stat. 971, 28 U. S. C. 2401(a).

Argument

In essence there are two questions before this Court. First of all, does a contractor's claim accrue under the Tucker Act on the date he completes performance, regardless of the subsequent institution of administrative proceedings by him? Secondly, is the running of the statute of limitations upon claims under the Tucker Act tolled during the pendency of proceedings under the disputes clause?

In its decision below, the Second Circuit perpetuated the error previously made by that court in *States Marine Corp.* v. *United States,* 283 F.2d 776 (2d Cir. 1960), and answered the first question in the affirmative and the second in the negative. It is interesting to note, however, that Judge Friendly, one of the five judge majority, indicated in a separate concurring opinion that the doctrine of *stare decisis* compelled him to agree with the majority because the case was governed by that court's prior decision in *States Marine.* However, if the case were one of first impression, Judge Friendly indicated he might well have adopted the position of the Third Circuit in *Northern Metal Co.* v. *United States,* 350 F.2d 833 (3rd Cir. 1965), that the statute of limitations is tolled during the pendency of proceedings under the disputes clause. Had Judge Friendly taken this view, he and the four dissenting judges would have become the majority, overruling the *States Marine* case in favor of the tolling approach in *Northern Metal.*

This Court is not similarly constricted by *stare decisis* —quite to the contrary, a long established line of cases

holds that a contractor-plaintiff's cause of action does not "accrue" within the meaning of the statute of limitations until the date of the final administrative decision denying his claim. In *Nager Elec. Co., Inc.* v. *United States,* 6 CCH Government Contracts Reporter, ¶80,728 at p. 85,937 (October 14, 1966), the Court of Claims stated:

> "In sum, the uniform course of this court's practice has been, ever since the issue first arose, that, for matters required to be processed under a mandatory 'disputes' provision, the judicial claim does not ripen so as to trigger limitations until the duly-invoked decision of the administrative or arbitral board or tribunal (if that determination post-dates completion-and-acceptance). In such a case the claim does *not* accrue on completion or acceptance, but at the later time."

See also *Electric Boat Co.* v. *United States,* 81 Ct. Cls. 361 (1934), *cert. denied,* 297 U. S. 710 (1936); *Holton, Seelye & Co.* v. *United States,* 106 Ct. Cls. 477, 75 F. Supp. 903 (1946); *Atlantic Carriers, Inc.* v. *United States,* 131 F. Supp. 1 (S. D. N. Y. 1955); *Friedman* v. *United States,* 310 F.2d 381, 385-88 (Ct. Cls. 1962); *Austin Engineering Co., Inc.* v. *United States,* 88 Ct. Cls. 559 (1939); *Brister & Koester Lumber Corp.* v. *United States,* 188 F.2d 986 (D. C. Cir. 1951).

This well established interpretation has been accepted and acted upon by the bar and by the business community. Congress has indicated no dissatisfaction with the long standing rule. The government's only authorities to the contrary are *States Marine* and now the Second Circuit's split decision below. These decisions are not only bad law but are inconsistent with public policy.

First of all, such holdings literally turn the disputes clause procedure into a trap for contractors who had acted in unquestioned good faith. By following contractual procedures they may now be barred from pursuing their just claim in court unless a concurrent suit was filed. Secondly, such a rule would in the future flood the Court of Claims and the District Courts with completely unnecessary "protective suits." Such actions would serve absolutely no practical or substantive purpose, would clog already overcrowded dockets, and would unnecessarily increase the cost of government contracting.

Consequently, it is difficult to believe that counsel for the government can be representing the public interest in arguing for a judicial reversal of this long-established rule of law. If such a change were desirable, the change should be made by Congress in a new statute which would put the business community and the bar on notice and which would have only a prospective effect. The change should not be done retroactively by means of a judicial decision which overturns an established rule of law upon which the bar and business community have relied in good faith. Furthermore, the just claims of plaintiff-contractors should not be defeated on such a narrow and inequitable basis since this would only subvert one of the original functions of the Court of Claims—the avoidance of a large number of private bills in Congress for the payment of the debts and obligations of the government.

Regardless of when a cause of action "accrues" under the Tucker Act, *Northern Metal Co.* v. *United States, supra,* indicates that the statute of limitations is "tolled" during

the pendency of administrative procedures under the disputes clause. This view was shared by the dissenting judges on the Second Circuit below, and Judge Friendly also indicated an inclination to adopt such a position had the case been one of first impression. The fundamental justice in such an approach is clear and persuasive.

The Wunderlich Act, Act of May 11, 1954, 68 Stat. 81, 41 U. S. C. §321, which governs the scope of judicial review of agency disputes clause decisions, provides that no suit may be maintained unless the contractor can say that the final administrative decision is arbitrary, capricious, fraudulent, grossly erroneous, or not supported by substantial evidence. But the contractor cannot aver any of these factors until the administrative decision has actually been rendered. See *United States* v. *Utah Construction Co.*, 384 U. S. 394, 399 (1966).

Furthermore, the government has no countervailing equities mitigating against tolling. Although procedures under the disputes clause are inevitably time consuming, as evidenced by the present case, the government may always move for a prompt hearing or to dismiss for lack of prosecution if delays seem unwarranted. Furthermore, such delay is no true detriment to the government since interest is not allowable on any recovery. There is also no reason to believe that the government's evidence or records becomes stale, lost, destroyed or otherwise unavailable. Thus, it is both fair and logical that administrative proceedings toll the running of the statute of limitations. See *Nager Elec. Co.* v. *United States, supra.*

Conclusion

This Court is respectfully urged to follow the long-established line of cases holding that a contractor's cause of action does not accrue within the meaning of the Tucker Act's statute of limitations until the date of the final administrative decision denying his claim. In the alternative, the Court is respectfully urged to hold that the statute of limitations upon claims under the Tucker Act is tolled during the pendency of proceedings under the disputes clause.

Dated: December 29, 1966

Respectfully submitted,

THOMAS KIERNAN
Amicus Curiae

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RAYNER M. HAMILTON
Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 371

CROWN COAT FRONT COMPANY, INC., *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE BY THE ELECTRONIC INDUSTRIES ASSOCIATION IN SUPPORT OF PETITIONER

Pursuant to Rule 35 of the Supreme Court of the United States, the Electronic Industries Association files this motion for leave to file brief as Amicus Curiae in behalf of Crown Coat Front Company, Inc., Petitioner, in the instant case.

ELECTRONIC INDUSTRIES ASSOCIATION

By GRAHAM W. MCGOWAN
General Counsel
2001 Eye Street, N.W.
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INTEREST OF AMICUS CURIAE

The Electronic Industries Association (hereinafter referred to as EIA) is a major trade association, headquartered at 2001 Eye Street, N.W., in the District of Columbia. It represents nearly 300 domestic electronic manufacturers. It is the national association representing the fifth largest manufacturing industry in the United States with gross annual sales in excess of $15 billion. The manufacture of electronics includes the manufacture, installation and operation of nation-wide, world-wide electronic systems. The development and installation of these systems frequently consumes a period of many years. Technical improvements made in the electronic equipment during the installation of such systems often require substantial changes in the early concept to avoid obsolescence of the entire system. Due to the complexity of the problems involved in the manufacture, installation and operation of such electronic systems many Government contracts are awarded on a cost plus fixed fee basis with the cost to be determined at some period of time considerably subsequent to the completion of the work, in situations as set forth below.

After the fact negotiation of each year's allowable overhead with the government is conducted on an overall basis rather than separately under each contract by contractors with a large number of defense contracts. Where the contracts are with more than one military department, the Government's negotiating team will ordinarily include representatives of each of the Services. Subcontractor's costs billings and adjustments of previous billings may be received long after the work has been completed.

When such a billing is received, it is often proper, under generally accepted accounting practices, to charge the period in which the bill is received rather than disturb prior years' results. Thus, there will often be further charges under the contract to periods after the work has been completed.

The Government has the right to audit the contractor's costs at any time or times prior to final payment, pursuant to the "Allowable Cost, Fixed Fee and Payment" clause (ASPR 7-203.4), or some similar clause which appears in all cost-type contracts. The customary practice, however, is to delay the final comprehensive audit of direct costs until such time as the contract is ready to be "closed-out" and the contractor has submitted a final "completion voucher" covering all costs due and owing and such part of the fee as the Government has withheld. This, of course, occurs only when all overhead rates have been fixed and all subcontractor billing has been finalized. So it is not unusual to find disallowances of direct costs as well as overhead first being made years after the work has been completed and the costs actually incurred.

In cases where a dispute materializes, strict application of the *Crown Coat Front Company, Inc.** doctrine would mean that the cause of action had "accrued" long before the occurrence of the event that actually gives rise to the litigation—namely, the Government's refusal to reimburse an allegedly allowable cost.

QUESTIONS

1—Whether a right of action under a contract accrues prior to the time petitioner exhausts administrative remedies which are a mandatory provision of the contract?

2—If such right of action does accrue prior to the time Petitioner exhausts his administrative remedies, does the pendency of administrative action toll the Statute of Limitations?

3—If the pendency of administrative action does not toll the Statute of Limitations, then is such a contract provision valid if it in effect negates the Petitioner's right to sue?

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* 363 F. 2d 407 (1966).

RELEVANCY TO DISPOSITION OF THIS CASE

We recognize the urgency of a ruling which brings about a reasonable and early finality to a determination of party interests. It follows that such a ruling must preserve for the parties litigant a climate of fairness. Just claims must be met as must parties be relieved of undue exposure to claims of those who would cloud the true issues with lapse of time, vagueness, failing memories or missing witnesses. It appears that there is no finding in this case that the claim presented by Petitioner is unfair or that the Petitioner has not been diligent, and it must be noted that the Government chose to defend on the ground that the Statute of Limitations had run.

Whereas it may be conceded that there exists no jurisdiction for this type of litigation except for the jurisdiction conferred upon the court by 28 USC 2401(a). The likelihood of the courts extending this grant of jurisdiction is only exceeded by the impossibility of the courts diminishing the grant. However, the court, in this case in seeking a way to avoid extending the statutory period has in effect opened the door to eliminating it. As an example, a fixed cost contract for an uncomplicated item may be completed within one year and the contractor then has six years to litigate any dispute arising thereafter, provided he has exhausted his administrative remedies; if he has not done this, then according to the *United States* v. *Holpuch Co. Case*,* he must exhaust his administrative remedies and according to the *Crown Coat Front Co. Inc.* v. *United States Case*,** he then has the time remaining in the six year period to litigate. It may therefore be reasoned that should the administrative review consume six years; the contractor has lost his right to litigate. By such a ruling the court has deprived the contractor of a statutory right by insisting that he follow a contractual right to first exhaust the administrative remedies, all without evidence of laches or lack of diligence on the part of either party

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* 328 U.S. 730 (1946).

** 363 F. 2d 407 (1966).

and without concern for the latent invalidity of such a contract provision.

The fairness of such a ruling appears not to have been considered. The dissenting views of Justices Anderson, Kauffmann, Hayes and Feinburg correctly refer to a doctrine of fairness in applying the Statute of Limitations. We believe that the contract created for the Petitioner not only a right, but an obligation to apply for administrative relief prior to any judicial relief. Having successfully bargained for a contract providing not only the right but the obligation to seek administrative relief for contract claims in the event of a contract dispute, the Petitioner has not received the final benefit of the contract until he has diligently availed himself of all the contract rights, including the right to administrative relief. When administrative review has been completed and the right of the parties have been determined administratively, then for the first time the Petitioner has completed his contract and has a right to resort to the courts. It is respectfully submitted that at this point of time if the Petitioner has been diligent that the Petitioner's cause of action accrues. The Statute of Limitation has not been tolled nor has the period of time been extended, it simply has not become applicable, the court thus retains the jurisdiction to determine the issue of timeliness and avoids giving illegal effect to a contract provision intended only to reduce the occasions for litigation not to preempt it.

CONCLUSION

It is the belief of the Amicus Curiae, Electronic Industries Association, Inc., that the facts presented in this motion clearly indicate the great interest of the electronics industry in the questions presented by this case. This interest it is believed is sufficiently different and important than that of the Petitioner to entitle them to file a brief amicus curiae.

ELECTRONIC INDUSTRIES ASSOCIATION

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SUPREME COURT OF THE UNITED STATES

No. 371.—October Term, 1966.

Crown Coat Front Co., Inc., Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[April 10, 1967.]

Mr. Justice White delivered the opinion of the Court.

The standard disputes clause in government contracts requires that "any dispute concerning a question of fact arising under this contract," not disposed of by agreement, shall be decided by the contracting officer, with the right of appeal within 30 days to the department head or his representative (normally a board of contract appeals) whose decision shall be final "unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith."[1] The "arising under" claims

[1] The disputes clause contained in the contract between petitioner and the Government provides:

"Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith, be final and conclusive; provided that, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an oppor-

subject to final administrative determination are those claims asserted under other clauses of the contract calling for equitable adjustment of the purchase price or extensions of time upon the occurrence of certain events.[2] One of these clauses is the so-called "Changes" clause which permits the contracting officer to make changes within the scope of the contract, provides that if any change causes an increase or decrease in the cost of, or the time required for the performance of the work, "an equitable adjustment shall be made in the contract price or delivery schedule," and states that failure to agree upon an adjustment shall be a question of fact within the meaning of the disputes clause.[3]

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tunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision."

For the disputes clause presently in use, see 32 CFR § 597.103–12.

[2] Claims not arising under those other clauses of the contract calling for equitable adjustment and therefore not within the disputes clause will sometimes be referred to herein as "breach" claims. See *United States* v. *Utah Construction Co.*, 384 U. S. 394, 403–418.

[3] The record in this case contains only excerpts from the changes clause of the contract at issue here. The standardized version of the changes clause for fixed-price supply contracts provides, in its entirety, that:

"The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes, within the general scope of this contract, in any one or more of the following: (i) Drawings, designs, or specifications, where the supplies to be furnished are to be specially manufactured for the Government in accordance therewith; (ii) method of shipment or packing; and (iii) place of delivery. If any such change causes an increase or decrease in the cost of, or the time required for the performance of any part of the work under this contract, whether changed or not changed by any such order, an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly. Any claim by the Contractor for adjustment under this clause must be asserted within 30 days from

This case involves a claim for an equitable adjustment, asserted under the changes clause and rejected by the contracting officer and the Armed Services Board of Contract Appeals. The contractor brought suit in the District Court under 28 U. S. C. § 1346[4] alleging that the decision of the Board was arbitrary, capricious and not supported by substantial evidence. The District Court dismissed the case as barred by 28 U. S. C. § 2401 (a) which provides that "Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues . . . ." The principal question here is whether the "right of action" with respect to a claim within the disputes clause first accrues at the time of the final administrative action or at an earlier date.

The facts are quite simple. On May 14, 1956, petitioner contracted with the United States to furnish a specified number of canteen covers which were to be

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the date of receipt by the Contractor of the notification of change, provided, however, that the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Where the cost of property made obsolete or excess as a result of a change is included in the Contractor's claim for adjustment, the Contracting Officer shall have the right to prescribe the manner of disposition of such property. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled 'Disputes.' However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed." 32 CFR § 7.103-2.

The excerpted version of the changes clause in this case appears in the unreported opinion of the District Court, and it seems substantially identical to the full clause quoted above.

[4] Section 1346 in relevant part provides that the District Courts shall have original jurisdiction, concurrent with the Court of Claims, of ". . . (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded . . . upon any express or implied contract with the United States . . . ."

lined with mildew-resistant felt of certain specifications. The Government, which was authorized to inspect materials to be used under the contract, tested and rejected certain samples of felt purchased by petitioner because they allegedly did not contain the contract quantities of mildew inhibitors. Petitioner agreed to a price reduction, however, and was permitted to complete the contract. Final delivery, originally scheduled for October 11, 1956, was made on December 14, 1956. Allegedly, in March 1959, plaintiff first discovered the nature of the tests which the United States had performed on the felt. Claiming that the use of such tests was not within the contemplation of the contract and constituted a change in contract specifications, plaintiff filed a claim with the contracting officer in October 1961, demanding an equitable adjustment in the contract price in the form of a refund of the price reduction and compensation for increased costs occasioned by substantial delay resulting from defendant's rejection of the felt samples. The contracting officer denied the claim. On February 28, 1963, the Board of Contract Appeals affirmed the contracting officer's decision. On July 31, 1963, more than six years after petitioner had completed performance of the contract, petitioner brought suit in the District Court alleging that the Board's decision was capricious, arbitrary and not supported by substantial evidence and that he was entitled to an equitable adjustment as provided in the contract. The United States, among other things, denied that the claim was within the disputes clause and asserted that the suit was time barred by § 2401 (a). Without deciding whether the claim arose under the contract within the meaning of the disputes clause, the District Court dismissed the suit as barred by the statute of limitations. The Court of Appeals, sitting *en banc*, affirmed in a five to four decision. 363 F. 2d 407. Relying on *McMahon* v. *United States*, 342 U. S. 25, and its own

decision in *States Marine Corp. of Delaware* v. *United States*, 283 F. 2d 776, which arose under the Suits in Admiralty Act, the majority below concluded that the right of action first accrued no later than December 14, 1956, the date of the final delivery of the disputed canteen covers, and was therefore time barred by § 2401 (a). The court disagreed with the decision of the Court of Appeals for the Third Circuit in *Northern Metal Co.* v. *United States*, 350 F. 2d 833, which, like *States Marine*, *supra*, involved the Suits in Admiralty Act. The Court of Appeals for the Third Circuit had agreed with *States Marine* as to when the time bar begins to run but had held that the statute was tolled during the pendency of the administrative proceedings. Because of this apparent conflict, we granted certiorari, 385 U. S. 811. We reverse.

Since the decision below, the Court of Claims has decided *Nager Electric Co., Inc.* v. *United States*, 368 F. 2d 847, a unanimous decision by that court supported by an exhaustive opinion by Judge Davis dealing with the application of the "first accrual" language of 28 U. S. C. § 2501 [5] to both breach and disputes clause claims under the typical government contract. The conclusion of the Court of Claims was that it would adhere to what it considered to be its long-standing rule: (1) when administrative proceedings with respect to a contractor's claim subject to the disputes clause extend beyond the completion of the contract, his right of action first accrues when the administrative action is final,[6] and not before,

[5] Section 2501 provides as follows: "Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed, within six years after such claim first accrues."

[6] Where the administrative proceedings have not extended beyond the date of completion of the contract, the Court of Claims' rule has been that "the claim accrues, and the statutory period commences, at the time of completion or acceptance (if the latter is contemplated)." 368 F. 2d 847, 853.

and (2) when the contractor has breach claims as well as disputes clause claims the statute begins to run on breach claims as well only at the conclusion of administrative action on the claims arising under the contract.[7] As will be evident below, we do not reach the question of breach claims in this case. But with respect to claims arising under the contract, such as one asserted under the changes clause, we agree with the Court of Claims and essentially for the reasons which that court articulated.

1. We start with the obvious: Section 2401 (a) provides a time limit upon bringing civil actions against the United States. The "civil action" referred to is a civil action in a court of competent jurisdiction. Cf. *Unexcelled Chemical Corp.* v. *United States*, 345 U. S. 59. Such a civil suit is seemingly barred if the right to bring it first accrued more than six years prior to the date of filing the suit. Our initial inquiry is, therefore, when the right of the contractor in this case to bring suit in the District Court first accrued. In our opinion, if his claim arose under

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[7] The Court of Claims summarized its prior rulings with respect to co-existing breach and disputes clause claims as follows:

"Reading them all together, these opinions show, we think, that where a contractor has both 'disputes-clause' items and 'breach-type' claims under a single contract, the following standards have controlled in this court: (i) there should be only one suit to enforce the various claim-items; (ii) the contractor *can* bring suit on the ripened 'breach-type' items before completion of the administrative process on the 'disputes-clause' items, but if he does so he may well lose the latter claims unless he includes them (by proper amendment, if necessary, as they mature) in his court action; *but* (iii) the contractor need not file suit on the 'breach-type' items until after the end of the administrative process, when all the items have ripened and can be included in the one petition. In sum, our rule has been that the time-bar will not fall until six years after the administrative determination, but suit can be filed earlier, with the plaintiff taking the risk that he may thereby split his cause of action." 368 F. 2d 847, 857.

the contract, it first accrued at the time of the final decision of the Armed Services Board of Contract Appeals, that is, upon the completion of the administrative proceedings contemplated and required by the provisions of the contract.

With respect to claims arising under the typical government contract, the contractor has agreed in effect to convert what otherwise might be claims for breach of contract into claims for equitable adjustment. The changes clause, for example, permits the Government to make changes in contract specifications. Such changes are not breaches of contract. They do give rise to claims for equitable adjustments which the Government agrees to make, if the cost of performance is increased or the time for performance changed. But whether and to what extent an adjustment is required are questions to be answered by the methods provided in the contract itself. The contractor must present his claim to the contracting officer, whose decision is final unless appealed for final action by the department head or his representative, here the Armed Services Board of Contract Appeals. Until that Board has acted, the contractor's claim is not subject to adjudication in the courts.[8] Until then, he has only the right to have the existence and extent of his claimed adjustment determined by the administrative process agreed upon. But, as we have said, the "right of action" of which § 2401 (a) speaks is not the right to administrative action but the right to file a civil action in the courts against the United States. Under the contract we have here, the contractor's claim was subject only to administrative, not judicial, determina-

[8] We do not have a situation here where the United States refuses to process the claim in accordance with its agreement or otherwise departs from the agreed-upon scheme for settling disputed issues within the disputes clause.

tion in the first instance, with the right to restort to courts only upon the making of that administrative determination.

It is now crystal clear that the contractor must seek the relief provided for under the contract or be barred from any relief in the courts. In *United States* v. *Holpuch*, 328 U. S. 234, the question was whether a contractor's failure to exhaust the administrative appeal provisions of a government construction contract bars him from bringing suit in the Court of Claims to recover damages. The Court held that it did. According to the Court, the disputes clause

> "is a clear, unambiguous provision applicable at all times and binding on all parties to the contract. No court is justified in disregarding its letter or spirit. . . . It creates a mechanism whereby adjustments may be made and errors corrected on an administrative level, thereby permitting the Government to mitigate or avoid large damage claims that might otherwise be created. *United States* v. *Blair*, 321 U. S. 730, 735. This mechanism, moreover, is exclusive in nature. Solely through its operation may claims be made and adjudicated as to matters arising under the contract. . . . And in the absence of some clear evidence that the appeal procedure is inadequate or unavailable, that procedure must be pursued and exhausted before a contractor can be heard to complain in a court." 328 U. S. 234, 239–240.

See also *United States* v. *Blair*, 321 U. S. 730, and *United States* v. *Callahan Walker Co.*, 317 U. S. 56, 61, where the disputes clause procedures are described as the "only avenue for relief."

2. Even when the contractual scheme has run its course and the contractor is free to file his suit in court, he is not entitled to demand a *de novo* determination of

his claim for an equitable adjustment. The evidence in support of his case must have been presented administratively and the record there made will be the record before the reviewing court. *United States* v. *Carlo Bianchi & Co.*, 373 U. S. 709; *United States* v. *Utah Construction Co.*, 384 U. S. 394. The court performs principally a reviewing function. Only if it is alleged and proved that the administrative determination was arbitrary, capricious, or not supported by substantial evidence may the court refuse to honor it. This much is clear not only from the disputes clause itself but from the Wunderlich Act.[9] In that statute, entitled "An Act to Permit Review . . . ," 68 Stat. 81, Congress widened the scope of judicial review but at the same time recognized the finality of the administrative decision absent the specified grounds for setting it aside. The focus of the court action is the validity of the administrative decision. Until that decision is made, the contractor cannot know what claim he has or on what grounds administrative

[9] 41 U. S. C. §§ 321 and 322 provide as follows:

"§ 321. Limitation on pleading contract-provisions relating to finality; standards of review.

"No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fradulent [*sic*] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."

"§ 322. Contract-provisions making decisions final on questions of law.

"No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."

action may be vulnerable. It is only then that his claim or right to bring a civil action against the United States matures and, as the Court of Claims said, that he has "the right to demand payment . . . the hallmark of accrual of a claim in this court." 368 F. 2d 847, 859.

3. To hold that the six-year time period runs from the completion of the contract, as the Government insists, would have unfortunate impact. The contractor is compelled to resort to administrative proceedings which may be protracted and which may not only last beyond the completion of the contract but continue for more than six years thereafter. If the time bar starts running from the completion date, the contractor could thus be barred from the courts by the time his administrative appeal is finally decided. This would be true whether he wins or loses before the board of appeals. Even if he prevailed there and was granted the equitable adjustment he sought, the Government would be immune from suit to enforce the award if more than six years had passed since the completion of the contract. This is not an appealing result, nor, in our view, one that Congress intended. The Wunderlich Act evidences a congressional purpose to insure adequate judicial review of administrative decisions on claims arising under government contracts; it is very doubtful that it anticipated no review at all if administrative proceedings, compulsory on the contractor, continued for more than six years beyond the contract's completion date.[10]

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[10] The Committee Report on the Wunderlich Act disaffirms any intention to confer any new rights on the contractor other than the widened scope of review and refers specifically to the six-year statute of limitations barring stale suits against the Government. But the report does not suggest when the limitations period begins to run or purport to alter or to disagree with the then extant judicial constructions of either § 2401 or § 2501 by the Court of Claims or by any other court. See H. R. Rep. No. 1380, 83d Cong., 2d Sess.

The Government suggests that the contractor may easily avoid such untoward results by the timely filing of a protective suit which could remain inactive pending the conclusion of administrative proceedings. But the contractor is not legally entitled to ask the courts to adjudicate his claim as an original matter. Nor can he sensibly ask the courts to review a decision which has not yet been made. He cannot, with honesty, make the necessary allegations to support an action for review until the administrative process is completed and the agency decision known. Since it would remain quiescent until the administrative decision is rendered, the protective suit would be a sheer formality in any event—a procedural trap for the unwary and an additional complication for those who manage the dockets of the courts. Certainly it would be no help to those contractors for whom it is already too late to file such a suit, which is true of the petitioner in this case.[11]

4. The Government challenges what the Court of Claims in *Nager* considered to be the long-standing rule found in its own past cases. It asserts that many of the cases from which the purported rule was sifted do not involve the standard disputes clause and those that do state the rule by way of dictum only. But we think the Court of Claims fairly reflected the thrust and tenor

[11] We should in this respect heed the words of the Court of Claims: "The United States has known for decades that contract suits will be timely in this court if they are filed within six years after the administrative determination, and has probably acted on that assumption in keeping records and retaining evidence. On the other hand, to say abruptly at this moment that limitation runs from the contract's completion, regardless of subsequent mandatory administrative proceedings, would undoubtedly cut off scores of contractors who, relying on our past decisions, have waited to bring suit until the ending of the administrative process. There is no adequate reason to disrupt these justified expectations." 368 F. 2d 847, 860.

of its prior opinions.[12] At least, based on those cases, the ordinary contractor would have been wholly justified in concluding that he had six years from the conclusion of administrative proceedings to file his suit. Nor, aside from the decision in this case, have we been cited to any circuit court decisions in Tucker Act cases which are contrary to the rule followed by the Court of Claims.

5. This brings us to the cases in this Court upon which the Government and the Court of Appeals have relied: *McMahon* v. *United States, supra; Soriano* v. *United States,* 352 U. S. 270; and *Unexcelled Chemical Corp.* v. *United States, supra.* None of them was a Tucker Act suit involving a disputes clause claim. *McMahon* was an action brought by an injured seaman against the United States for negligence and unseaworthiness. The Suits in Admiralty Act requires actions to be brought within two years after "the cause of action arises." The Clarification Act, 57 Stat. 45, 50 U. S. C. App. § 1291 (a), which brought such a seaman's suit within the ambit of

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[12] The cases cited by the Court of Claims are the following:

Electric Boat Co. v. *United States,* 81 Ct. Cl. 361, 367–368, cert. denied, 297 U. S. 710; *Austin Eng'r Co.* v. *United States,* 88 Ct. Cl. 559, 562–564; *Holton, Seelye & Co.* v. *United States,* 106 Ct. Cl. 477, 501, 65 F. Supp. 903, 907; *Griffin* v. *United States,* 110 Ct. Cl. 330, 372–373, 77 F. Supp. 197, 206, rev'd on other grounds, *United States* v. *Jones,* 336 U. S. 641; *Art Center School* v. *United States,* 136 Ct. Cl. 218, 226, 142 F. Supp. 916, 921; *Empire Institute of Tailoring, Inc. v. United States,* 142 Ct. Cl. 165, 168, 161 F. Supp. 409, 411; *International Potato Corp.* v. *United States,* 142 Ct. Cl. 604, 606–607, 161 F. Supp. 602, 604–605; *Clifton Products, Inc.* v. *United States,* 144 Ct. Cl. 806, 809, 169 F. Supp. 511, 512–513; *Cosmopolitan Mfg. Co.* v. *United States,* 156 Ct. Cl. 142, 144, 297 F. 2d 546, 547, cert. denied *sub nom., Arlene Coats* v. *United States,* 371 U. S. 818; *Steel Improvement & Forge Co.* v. *United States,* 174 Ct. Cl. —, 355 F. 2d 627, 631.

The Court of Claims also dealt with *Aktiebolaget Bofors* v. *United States,* 139 Ct. Cl. 642, 644, 153 F. Supp. 397, 399, a case containing statements seemingly contrary to those found in the above cases.

the Suits in Admiralty Act, permits court action only if the claim has been administratively disallowed, but sets no time within which a claim must be presented to the administrative body. The Court held that the limitations period ran from the time of the injury, not from the date of the disallowance of the claim. The Court saw no indications that Congress in passing the Clarification Act intended to postpone the usual time of accrual of the cause of action until the date of disallowance, since this would permit the claimant to postpone indefinitely the commencement of the running of the statutory period.

The Court has pointed out before, however, the hazards inherent in attempting to define for all purposes when a "cause of action" first "accrues." Such words are to be "interpreted in the light of the general purpose of the statute and of its other provisions, and with due regard for those practical ends to be served by any limitation of time within which an action may be brought." *Reading* v. *Koons*, 271 U. S. 58, 62; see also *United States* v. *Dickinson*, 331 U. S. 745, 748. Cases under the Suits in Admiralty Act do not necessarily rule Tucker Act claims. The purpose of the Clarification Act was to prevent unnecessary litigation by providing for notice of injury to the United States and for the opportunity to settle claims administratively. But while suit was permitted only if a claim had been "disallowed," the applicable regulations provided that if a claim was not rejected within 60 days after filing, it would be deemed to have been administratively disallowed and the claimant free to enforce his claim. There was no chance for administrative action to consume the entire limitations period and therefore bar all resort to the courts.

In disputes clause cases, however, final administrative action, which the claimant must await, may occur more than six years after the completion of the contract. When it does, the claimant would be time barred if the

six-year period is measured from the date of final performance. Nor does the claimant in cases like the one before us have unlimited discretion as to when to file his claim. The standard changes clause [13] requires him to present his claim within 30 days and most other clauses in government contracts calling for an equitable adjustment also contain their own time limitations. Where this is not true, the contractor cannot delay unreasonably

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[13] The Court of Claims dealt with the matter as follows:

"Similarly, the contractor in the cases before us (and the mass of such cases) is not left at large to present his claim administratively whenever he likes. The Disputes clause does not itself fix a time within which a disputed issue of fact must be presented to the contracting officer, but that is not ordinarily true of the various substantive contractual clauses which lead to equitable adjustments or comparable relief under the contract. Those specific clauses usually have built-in time limits, and where no specific period is established in the contract the contractor cannot delay unreasonably. Cf. Dawnic Steamship Corp. v. United States, 90 Ct. Cl. 537, 579 (1940). Neither this court nor the administrative tribunals have had any great difficulty in handling belated claims by contractors under the various contract-adjustment articles. Contractors have not been able to extend the limitations period unduly by unilaterally postponing the commencement of the administrative process." 368 F. 2d 847, 864.

The court also noted that:

"The standard Changes clause in construction contracts provides that claims for adjustment must be asserted within 10 days; the Changed Conditions clause calls for an immediate notification to the contracting officer; the Delays-Damages clause contemplates a notice within 10 days of excusable delays; the Price Adjustment for Suspensions, Delays, or Interruption of Work clause sets 20 days as the normal period. See *United States* v. *Utah Constr. & Mining Co.*, 384 U. S. 394, 397–399 n. 1, 416 n. 14, 86 S. Ct. 1545, 16 L. Ed. 2d 642 (1966)." *Ibid.*

The 30-day period within which a fixed-price supply contractor must assert his claim for equitable adjustment arising from changes, see text above and *supra*, n. 3, may be shortened in accordance with Department procedure, 32 CFR § 7.103–2, or with negotiations, 32 CFR § 597.103–2.

in presenting his claim. This is the rule the Court of Claims follows. See *Nager Electric, supra,* at 864.

Nor do *Soriano* or *Unexcelled* control this case. In *Soriano* the six-year time bar was held to run from the date of the requisitioning of food stuffs and equipment by Philippine guerrilla forces and not from the date of the disallowance of a claim filed with the Army Claim Service. The majority in that case expressly held that the administrative action was not a prerequisite to suit in the Court of Claims. Likewise, in *Unexcelled,* where the statutory period was held to run from the date of the breach of statutory duty under the Walsh-Healey Act rather than from the date of the administrative determination of the liquidated damages due the Government, it seems apparent that the United States, to whom damages were payable, could have brought suit without first resorting to administrative remedies.

6. Finally, the Government relies on Public Law 89–505, 80 Stat. 304, 28 U. S. C. § 2415, passed by the Congress on July 18, 1966, which for the first time established a general statute of limitations on government tort claims and on suits by the Government for money damages founded on any contract, express or implied. Such suits must now be brought within "six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law." As an example of such administrative proceedings, the relevant committee reports and hearings mentioned the administrative proceedings required under the standard disputes clause contained in the government contract. H. R. Rep. No. 1534, 89th Cong., 2d Sess., at 4; S. Rep. No. 1328, 89th Cong., 2d Sess., at 3; Hearings on H. R. 13652 before Subcommittee No. 2 of the House Committee on the Judiciary, 89th Cong., 2d Sess., 7 (1966). Based on this new provision, the Government argues that Congress neces-

sarily assumed that the right of action of the United States in disputes clause situations first accrues and the limitations period begins to run prior to the completion of administrative proceedings. Otherwise there would have been no need for the one-year period following final administrative decision in order to save actions which might otherwise be barred by the six-year limitations. What this amounts to, the Government says, is a congressional construction of the similar "first accrual" language of the older limitations on private actions contained in § 2401 (a) and § 2501. Likewise, it argues, this construction precludes holdings such as that of the Third Circuit in *Northern Metal Co.* to the effect that the statute is tolled during the pendency of administrative proceedings.

This argument is not without force. There is no question of the power of Congress to define the limits of its waiver of sovereign immunity. But we are not convinced that Congress intended to issue any determinative construction of § 2401 in formulating and passing § 2415. Neither in the hearings on H. R. 13652 nor in the committee reports did Congress focus on the first accrual language of § 2401, on the existing construction of that language by the Court of Claims or any other court or on the situation of the government contractor desiring to sue the United States during or after the conclusion of administrative proceedings under the disputes clause. The bill was recommended to the Congress by the Department of Justice at the time the Department was litigating *Nager Electric* in the Court of Claims in which the Department ultimately took the position that the private contractor's right of action first accrues no later than the completion of the contract. This position was rejected by the Court of Claims, in favor of what is considered to be its existing rule—that the private contractor's right to sue on a disputes clause

claim first accrues with the termination of administrative proceedings. Given the Wunderlich Act, and the prior litigative history of disputes clause issues in this Court and in the Court of Claims, we are doubtful that Congress intended to bar a private contractor's suit on a disputes clause claim where administrative proceedings continue for more than six years after the completion of the contract. Congress understood what the impact of such a rule would be if applied to the Government and made due allowance for it by allowing the Government the one-year grace period. We see no indications that it had in mind the private litigant whose right to sue the United States is governed by § 2401. We are hesitant to believe that in passing a statute aimed at equalizing the litigative opportunities between the Government and private parties [14] Congress consciously extended a one-year saving period to the Government to overcome the effects of protracted administrative proceedings and

[14] The congressional intent to "put the Government on a parity with those private litigants who may sue" and "to equalize the position of litigants" is sufficiently evident. See Hearings on H. R. 13652 before Subcommittee No. 2 of the House Committee on the Judiciary, 89th Cong., 2d Sess., 9, 11 (1966); H. R. Rep. No. 1534, 89th Cong., 2d Sess., at 4; S. Rep. No. 1328, 89th Cong., 2d Sess., at 2. Whether Congress succeeded in establishing exact equality between contractors and the Government is of course another question. In this regard, it is interesting to note that in addition to the one year following the termination of administrative proceedings in which the Government can institute a suit under § 2415, subsection (e) of that provision provides that:

"In the event that any action to which this section applies is timely brought and is thereafter dismissed without prejudice, the action may be recommenced within one year after such dismissal, regardless of whether the action would otherwise be barred by this section. In any action so recommenced the defendant shall not be barred from interposing any claim which would not have been barred in the original action." 28 U. S. C. § 2415 (e).

refused similar relief to the contractor. At least we are sufficiently doubtful that we prefer to await a somewhat clearer signal from the Congress.

We therefore conclude that if the claim filed by the contractor in this case was a claim "arising under" the contract and was therefore subject to administrative determination, (1) his right to bring a civil action first accrued when the Armed Services Board of Contract Appeals finally ruled on his claim and (2) his suit in the District Court was timely filed. The Government in its answer to the complaint, however, denied that the claim arose under the contract, characterized it instead as a pure breach of contract claim which accrued no later than the date of the completion of the contract. The District Court did not decide this issue; nor do we. This matter will be open on remand to the District Court. If the claim is not within the disputes clause, the court may then determine whether it is time barred.

Reversed.